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HANDBOOK

OF

INTERNATIONAL LAW

BY
GEORGE GRAFTON WILSON

Professor of International Law in Harvard University, Lecturer on
International Law in Brown University and in the United States
Naval War College, American Delegate Plenipotentiary
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PREFACE

THE calling of the Peace Conference which assembled at The Hague in 1899 marked an epoch in International Law. The work of this Conference has been amplified and extended in many directions by the Conference for the Revision of the Geneva Convention in 1906, by the Second Hague Peace Conference in 1907, and by the International Naval Conference of 1908-1909.

Thus, after nearly three hundred years from the foundations laid by Grotius, "the father of International Law," in 1625, there rises a worthy structure and in a single decade the advance made in centuries is surpassed. Where earlier writers referred to philosophical or religious sanctions to fortify their expression of hope that justice might prevail among the nations, the writers of the present day refer to the sanction of international conventions embodying the realization of these hopes. Hubner, a century and a half ago, suggested an international prize court; in 1907 a convention for establishing such a court was drawn up, and is a typical example of the modern realization of the hopes of the early writers.

Many of the matters formerly receiving much attention in texts on International Law are now mainly of historical interest. New problems have arisen. The states of the world have been drawn nearer through improved means of transportation and communication. The security of trade routes is demanded. New means of transportation and communication have made necessary a consideration of rights of aerial domain. Minor political unities have acquired status. Spheres of influence receive attention. Economic, ethnic, and other unities have demanded a measure of recognition. The individual has gained a new place. "No longer does strange air make a man unfree."

The treaties of the early part of the nineteenth century related mainly to peace, amity, boundaries, navigation, and com-

merce. The treaties of recent years regulate trade-marks, copyrights, postal service, naturalization, extradition, arbitration, wireless telegraphy, condominium, leased territory, and other matters showing the closer interdependence and changed relations of modern states.

It is the aim of this Handbook of International Law to set forth as far as space permits the historical development of the principles of international law. Owing to the numerous and recent modifications of earlier views, particular attention is also given to those principles as they are at present interpreted. Law in international relations is more and more taking the place of war, and war itself, on land and more recently on the sea, has been brought under law. Diplomatic negotiation has gained in importance and accordingly has been given a more extended treatment. As far as possible, the texts of documents, treaties, and cases have been inserted, rather than lengthy and perchance misleading descriptions of their contents or nature, and late precedents and illustrations have been freely used. The appendices contain certain of the most important international documents.

The author desires particularly to testify to the great assistance which he has received from that unrivaled source-book for the precedents and practice of the United States, the International Law Digest of Professor John Bassett Moore. The works of text-writers and other valuable books to which most frequent reference has been made are mentioned in the bibliography, and the author acknowledges his indebtedness to these and to many others mentioned in the footnotes.

G. G. W.

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A. J. I.....American Journal of International Law.
Hertslet.....Hertslet's Map of Europe by Treaty.
Moore.....Moore's Digest of International Law.

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INTRODUCTION

WILS.INT.L.

(1)*

HANDBOOK OF INTERNATIONAL LAW

INTRODUCTION.

INTERNATIONAL LAW.

1. Definition of Public International Law.
2. Place of "International Private Law."
3. Development of International Law.
4. Sources of International Law.
5. Force of International Law.

DEFINITION OF PUBLIC INTERNATIONAL LAW.

1. **Public international law is the body of generally accepted principles governing relations among states.**¹

International law is a growth and is growing. It early became evident that if states were to exist in proximity there must be some standards which should regulate their conduct toward one another. The Egyptian states recognized this in ancient times and made treaties with their neighbors. Practice and theory contributed to the establishment of principles. These principles were from time to time added to, expanded, and otherwise modified. Writers attempted to find a basis for certain rules of state action in the laws of nature, in divine law, in Roman law, and elsewhere. Each additional sanction made international law more potent. As Professor Moore

¹ Other definitions are as follows:

International law, as understood among civilized nations, may be defined as consisting of those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing

well says: "It is thus apparent that from the beginning the science in question denoted something more than the positive legislation of independent states, and the term 'international law,' which has in recent times so generally superseded the earlier titles, serves to emphasize this fact. It denotes a body of obligations which is, in a sense, independent of and superior to such legislation."²

A recognition of the principles of international law is regarded as fundamental to the existence of a state in the modern sense.

In 1796 Justice Wilson said: "When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement."³

In 1824 an act of the United States Congress in regard to land definitely provided for a court trial "to settle and determine the question of the validity of title according to the law of nations, the stipulations of any treaty," etc.⁴ Referring to

among independent nations, with such definitions and modifications as may be established by general consent. Wheat. Int. Law, D, 23.

The aggregate of the rules which Christian states acknowledge as obligatory in their relations to each other, and to each other's subjects. The rules, also, which they unite, as in treaties, to impose on their subjects, respectively, for the treatment of one another, are included here, as being in the end rules of action for the states themselves. Woolsey, Int. Law (6th Ed.) 4.

The rules of conduct regulating the intercourse of states. 1 Halleck, Int. Law. 41.

International law is the collection of recognized facts and principles which unite different states into a juridical and humanitarian association, and which, in addition, assures to the citizens of the several states common protection in the enjoyment of the general rights pertaining to them as human beings. Bluntschli, Droit International, art. 1.

International law consists in certain rules of conduct which modern civilized states regard as being binding on them in their relations with one another, with a force comparable in nature and degree to that binding the conscientious person to obey the laws of his country, and which they also regard as being enforceable by appropriate means in case of infringement. Hall, Int. Law (5th Ed.) 1.

² 1 Moore, 2.

³ Ware, Adm. of Jones, v. Hylton et al., 3 Dall. 199, 281, 1 L. Ed. 568.

⁴ 4 Stat. 53, c. 173, § 2.

such acts the Supreme Court in 1832 interpreted "according to the law of nations" as according to "the usage of civilized nations."⁵

In 1815 Chief Justice Marshall stated the position of international law in an opinion which has been often cited:

"The law of nations is the great source from which we derive those rules, respecting belligerent and neutral rights, which are recognized by all civilized and commercial states throughout Europe and America. This law is in part unwritten and in part conventional. To ascertain that which is unwritten, we resort to the great principles of reason and justice; but, as these principles will be differently understood by different nations under different circumstances, we consider them as being, in some degree, fixed and rendered stable by a series of judicial decisions. The decisions of the courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect. The decisions of the courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this."⁶

In 1894 Justice Gray said in the case of *Hilton v. Guyot*:

"International law in its widest and most comprehensive sense—including not only questions of right between nations, governed by what has been appropriately called the law of nations, but also questions arising under what is usually called private international law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation—is a part of our law, and must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination."⁷

In the case of *The Paquete Habana*, decided in 1900, the

⁵ *United States v. De la Maza Arredondo et al.*, 6 Pet. 691, 712, 8 L. Ed. 547.

⁶ *Thirty Hogsheads of Sugar v. Boyle*, 9 Cranch, 191, 198, 3 L. Ed. 701.

⁷ 159 U. S. 113, 16 Sup. Ct. 139, 40 L. Ed. 95.

United States Supreme Court based its decision exempting coast fishing vessels from capture in time of war on "an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law."⁸

PLACE OF "INTERNATIONAL PRIVATE LAW."

2. "Private international law" or "international private law" is the term sometimes applied to the body of rules which regulate private rights involving the conflicting jurisdiction of different states. The proper title for the branch of law is "Conflict of Laws." This body of rules is properly a part of municipal law.⁹

In the case of *Hilton v. Guyot*, in 1894, Justice Gray said: "In case of conflict of laws, comity must determine the effect which will be given to the expression of the will of a foreign state. 'Comity,' in the legal sense, is neither a matter of absolute obligation on the one hand, nor of mere courtesy and good will on the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."¹⁰

⁸ *The Paquete Habana*, 175 U. S. 677, 20 Sup. Ct. 290, 44 L. Ed. 320.

⁹ Private international law is not, however, a part of international law proper. The latter, as has been seen, is concerned with the relations of states; in so far as individuals are affected, they are affected only as members of their states. Private international law, on the other hand, is merely a subdivision of national law. It derives its force from the sovereignty of the states administering it; it affects only the relations of individuals as such; and it consists in the rules by which courts determine within what national jurisdiction a case equitably falls, or by what national law it is just that it shall be decided. Hall, *Int. Law* (5th Ed.) 52.

¹⁰ 159 U. S. 113, 16 Sup. Ct. 139, 40 L. Ed. 95.

DEVELOPMENT OF INTERNATIONAL LAW.**3. The body of rules now known as international law has been of slow growth, and has particularly developed since the early days of the sixteenth century.**

Some of the practices which became customary, and subsequently were recognized as rules of international law, appeared very early. The ancient records of the East show certain usually observed rules of intercourse between states. A degree of uniformity of diplomatic procedure was developed in Greece. The spread of commerce in the Mediterranean Sea made necessary commercial comity. This gradually hardened into law. There appear remains of the early maritime law of Rhodes in Justinian's Digest.¹¹

Rome at first contributed rather to the body of international private law than to the field of public international law. Rome, however, in the *jus feciale* prescribed certain rules for the declaration of war and the negotiating of treaties. The conception of *jus gentium* varied with the development of European civilization and was differently interpreted by different writers. According to Justinian, "that law which natural reason has established among all men, that which is especially regarded by all, is called '*jus gentium*.'" ¹² The early idea at Rome seemed to be that *jus gentium* was the body of law in accord with the general reason of mankind. As the modern conception of state did not exist, it is evident that the idea of *jus gentium* was not used in the sense of the modern term, "international law," but rather in the sense of a body of law common to all mankind, because necessary for ordinary intercourse of man with man as regards selling, letting, hiring, partnerships, etc.

The term "*jus naturale*" was a philosophical concept, held by the Greek philosophers, which was popularized at Rome and came to be regarded as the foundation of all true law. *Jus naturale* was the law in harmony with the inherent forces

¹¹ Digest of Justinian, 14, 2.

¹² Institutes of Justinian, I, 2, 1.

of the universe.¹³ *Jus naturale* was frequently identified with *jus gentium*.

The idea of a law of nature strongly influenced early writers in the field of what was later called "international law," and the titles of early treatises often contain the term "*jus naturale*," or "*jus gentium*," or even both.¹⁴

Such writers as Victoria (1480-1546), Brun (1491-1563), Belli (1502-1575), Vasquez (1509-1566), Ayala (1548-1584), Saurez (1548-1617), Gentilis (1552-1608), usually look to some such broad philosophical basis as a support for their arguments.¹⁵

Grotius (1583-1645), whose great contribution to international law, "*De Jure Belli ac Pacis*," in 1625, marks a new epoch in the development of the science, recognizes the weight of *jus naturale*. He defines it as "the dictate of right reason, indicating that any act, from its agreement or disagreement with rational nature, has in it moral turpitude or moral necessity, and consequently such act is either forbidden or enjoined by God, the author of nature."¹⁶

The emphasis upon the idea of natural law led to the development of a school of "Naturalists." These were opposed by the "Positivists," basing their ideas of international law on customs and treaties. Between the extremes were those who recognized the value of both theory and precedent, who regarded themselves as exponents of the doctrines of Grotius.

Not merely the thought and philosophy of the period before the middle of the sixteenth century, but the course of events also, had taught men some lessons. "The world empire of Rome showed a common political sovereignty by which the acts of remote territories might be regulated; the world religion of the Church of the middle period added the idea of a common bond of humanity. Both of these conceptions im-

¹³ *Id.* I, 2, 2.

¹⁴ Pufendorf, *De Jure Naturæ et Gentium*, 1672.

¹⁵ Brun, *De Legationibus*, 1548; Belli, *De re Militari*, 1563; Vasquez, *Illustrium Controversarium*, 1564; Ayala, *De Jure et Officiis Bellicis et Disciplina Militari*, 1582; Suarez, *Tractatus de Legibus ac Deo Legislatore*, 1612; Gentilis, *De Legationibus*, 1585, *De Jure Belli*, 1588.

¹⁶ *De Jure Belli ac Pacis*, bk. I, c. 1, § 10.

bued men's minds with the possibility of a unity, but a unity in which all other powers should be subordinate to a single power, and not the unity of several sovereign powers acting on established principles. The feudal system emphasized the territorial basis of sovereignty. The Crusades gave to the Christian peoples of Europe a knowledge and tolerance of one another which the honor of the code of chivalry made more beneficent, while the growth of the free cities opposed the dominance of classes, feudal or religious. The fluctuations and uncertainties in theory and practice of international intercourse, both in peace and war, made men ready to hear the voice of Grotius."¹⁷

From the Peace of Westphalia, 1648, the modern idea of the state and of international law became more and more developed. Zouch (1590–1660), Professor of Roman Law at Oxford, distinguished between "jus gentium" and "jus inter gentes," the Law of Nations. Bentham (1748–1832) proposed the term "International Law," which is now generally accepted.

SOURCES OF INTERNATIONAL LAW.

4. (a) In the narrow sense the chief sources of international law are:

- (1) Custom.**
- (2) Treaties and other interstate agreements.**
- (3) The decisions of international tribunals.**

(b) In a broader sense there are also included in the sources of international law:

- (4) Decisions of national tribunals, such as prize courts.**
- (5) Opinions of text-writers.**
- (6) Diplomatic papers.**

(1) States in their relations to one another often follow customs which have never been formally enacted into law. These customs are tacitly accepted as binding upon states with

¹⁷ Wilson & Tucker, *Int. Law* (5th Ed.) 18.

For the general development of international law as illustrated by the early writers, see *Les Fondateurs du Droit International*, Paris, 1904.

the force of law.¹⁸ Sometimes a custom or usage looks back to what a single state has found good in some line of activity in which it is particularly engaged. As was said in the case of *The Scotia*: "Many of the usages which prevail, and which have the force of law, doubtless originated in the positive prescriptions of some single state, which were first of limited effect, but which, when generally adopted, became of universal obligation. The Rhodian law is supposed to have been the earliest system of maritime rules. It was a code for Rhodians only; but it soon became of general authority, because accepted and assented to as a wise and desirable system by other maritime nations. The same may be said of the Amalphitan table, of the ordinances of the Hanseatic League, and of part of the marine ordinances of Louis XIV. They all became the law of the sea, not on account of their origin, but by reason of their acceptance as such. * * * This is not giving to the statutes of any nation extraterritorial effect. It is not treating them as general maritime laws, but it is a recognition of the historical fact that by common consent of mankind these rules have been acquiesced in as of general obligation. Of that fact we think we may take judicial notice. Foreign municipal laws must, indeed, be proved as facts; but it is not so with the law of nations."¹⁹

¹⁸ Orlotan, *Diplomatie de la Mer*, liv. I, c. IV, 1.

"By an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war." *The Paquete Habana*, 175 U. S. 677, 20 Sup. Ct. 290, 44 L. Ed. 320.

¹⁹ 14 Wall. 170, 20 L. Ed. 822.

Sir William Scott's decisions, the source of so much authority, are frequently based on custom. In the case of the *Santa Cruz* he says: "There is a law of habit, a law of usage, a standing and known principle on the subject in all civilized countries. It is the common practice of European States in every war to issue proclamations and edicts on the subject of prize; but till they appear courts of admiralty have a law and usage on which they proceed, from habit and ancient practice, as regularly as they afterwards conform to the express regulations of their prize acts." 1 C. Rob. 50. And referring to the right of capture Sir William Scott in the celebrated case of *The Maria* says: "The right is equally clear in

In the opinion rendered in the case of *West Rand Central Gold Mining Company v. Rex*, June 1, 1905, the English court held in regard to international law that: "It is quite true that whatever has received the common consent of civilized nations must have received the assent of our country, and that to which we have assented along with other nations in general may properly be called international law, and as such will be acknowledged and applied by our national tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant. But any doctrine so invoked must be one really accepted as binding between nations, and the international law sought to be applied must, like anything else, be proved by satisfactory evidence, which must show either that the particular proposition put forward has been recognized and acted upon by our own country, or that it is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilized state would repudiate it. The mere opinions of jurists, however eminent or learned, that it ought to be so recognized, are not in themselves sufficient. They must have received the express sanction of international agreement, or gradually have grown to be part of international law by their frequent practical recognition in dealings between various nations." ²⁰

(2) Treaties and other interstate agreements, such as conventions, protocols, etc., may show upon any subject the attitude of the states parties to the agreements. Where a considerable number of states are parties to an agreement, as to the Convention for the Pacific Settlement of International Disputes, signed at The Hague, October 18, 1907, such a convention becomes in effect international law for the signatory states. In a less general way the reappearance of the same clause in a large number of treaties between two or a few states may indicate the existing law for all, and does indicate the existing law for the states parties to the treaties. When the

practice, for practice is uniform and universal upon the subject. The many European treaties which refer to this right refer to it as pre-existing and merely regulate the exercise of it." 1 C. Rob. 340.

²⁰ (1905) King's Bench Division, 39.

same clauses appear in treaties made between several different states at considerable intervals of time, it is usual to draw the same conclusions in regard to their general application.

(3) In recent years the practice of reference of questions liable to cause disagreement among states to international tribunals has become common. The Hague Convention of 1907 states: "Art. 41. With the object of facilitating an immediate recourse to arbitration for international differences, which it has not been possible to settle by diplomacy, the Contracting Powers undertake to organize a permanent Court of Arbitration as established by the First Peace Conference, accessible at all times, and operating, unless otherwise stipulated by the parties, in accordance with the Rules of Procedure inserted in the present Convention." Many temporary and special courts have been instituted.²¹ These tribunals usually decide the questions before them on broad grounds, and their decisions become precedents for subsequent tribunals. The decisions of the later tribunals more and more refer back to those of earlier years, and a considerable body of rules, practically a part of international law, has thus developed.²²

(4) "The decisions of the courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect. The decisions of the courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this."²³

Sir William Scott in 1799 said of the British prize court: "This court is properly and directly a court of the law of na-

²¹ "The summer of 1903 saw collected at Caracas ten full commissions appointed to adjudicate claims of as many nations against Venezuela, and also the commissioners of an eleventh (French) commission. Before these various bodies were presented for consideration many most interesting questions of international law, touching perhaps all of the problems likely to prove sources of difficulty between European and North American nations on the one hand and the South American Republics on the other." Preface, Venezuelan Arbitrations, 1903, Ralston's Report.

²² Moore, *International Arbitration*, 6 vols., 1898.

²³ Opinion of Marshall, *Thirty Hogsheads of Sugar v. Boyle*, 9 Cranch, 191, 3 L. Ed. 701.

tions only, and not intended to carry into effect the municipal law of this or any other country.”²⁴ The decision of a national prize court, if legally rendered, is held generally binding.

“International law in its widest and most comprehensive sense,” as was said by the United States Supreme Court in 1894, “is part of our law, and must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination.

“The most certain guide, no doubt, for the decision of such questions, is a treaty or a statute of this country. But where, as the case is here, there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is, whenever it becomes necessary to do so in order to determine the rights of parties to suits regularly brought before them. In doing this, the courts must obtain such aid as they can from judicial decisions, from the work of jurists and commentators, and from the acts and usages of civilized nations.”²⁵

(5) Text-writers upon international law usually consider interstate relations from broad points of view. They pay attention to historical development and consider ethical as well as jural bearings of such relations. They frequently attempt to set forth the underlying principles which may appear in customs, treaties, court decisions, and diplomatic negotiations. Wheaton says: “Without wishing to exaggerate the importance of these writers, or to substitute, in any case, their authority for the principles of reason, it may be affirmed that they are generally impartial in their judgment. They are witnesses of the sentiments and usages of civilized nations, and the weight of their testimony increases every time that their authority is invoked by statesmen, and every year that passes without rules laid down in their works being impugned by the avowal of contrary principles.”²⁶

In the case of *The Paquete Habana* the United States Supreme Court affirms that: “Where there is no treaty, and

²⁴ *The Walshingham Packet*, 2 C. Rob. 77.

²⁵ *Hilton v. Guyot*, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. Ed. 95.

²⁶ *International Law*, D, § 15, p. 23.

no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who, by years of labor, research, and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." ²⁷

(6) Diplomatic papers do not usually express anything beyond the attitude of a given state upon the matter under consideration. A general agreement among states, as shown in diplomatic correspondence, may be a presumptive evidence of the direction in which international law may be expected to move. A position vigorously maintained in diplomatic correspondence, and generally conceded, will tend to become a precedent, and to have great weight. The correspondence of various states with Russia in regard to the list of contraband in the Russo-Japanese war of 1904-05, and the protests against the decisions of the Vladivostok prize courts, did much to make clear the law in regard to contraband. ²⁸

One of the most consistent of diplomatic positions is that of the United States in regard to the exemption of private property at sea from capture; but even a long-continued and consistent diplomatic policy is not sufficient to determine the law. In the case of *The Pedro* the Supreme Court of the United States said: "Nor are we justified in expanding executive action by construction because of the diplomatic attitude of this government in respect of the exemption of all property, not contraband, of citizens and subjects of nations at war with each other—an exemption which has not as yet been adopted into the law of nations." ²⁹

²⁷ 175 U. S. 677, 20 Sup. Ct. 290, 44 L. Ed. 320.

²⁸ British Parliamentary Papers, Russia, 1905; Foreign Relations, U. S. 1904, 1905.

²⁹ 175 U. S. 354, 20 Sup. Ct. 138, 44 L. Ed. 195.

FORCE OF INTERNATIONAL LAW.**5. International law is a part of the municipal law of states.**

International law is generally recognized as a part of the law of the land, and is accordingly enforced by municipal authority.

The Constitution of the United States provides that Congress shall have power "to define and punish offences against the Laws of Nations."³⁰

"Congress has power to make all laws which shall be necessary and proper to carry into execution the powers vested by the Constitution in the government of the United States (article 1, section 8, clause 18); and the government of the United States has been vested exclusively with the power of representing the nation in all its intercourse with foreign countries. It alone can 'regulate commerce with foreign Nations' (article 1, section 8, clause 3); make treaties and appoint ambassadors and other public ministers and consuls (article 2, section 2, clause 2). A state is expressly prohibited from entering into any 'treaty, alliance, or confederation' (article 1, section 10, clause 1). Thus all official intercourse between a state and foreign nations is prevented, and exclusive authority for that purpose is given to the United States. The national government is in this way responsible to foreign nations for all violations by the United States of their international obligations, and because of this Congress is expressly authorized 'to define and punish * * * offences against the law of nations' (article 1, section 8, clause 10).

"The law of nations requires every national government to use 'due diligence' to prevent a wrong being done within its own dominion to any other nation with which it is at peace, or to the people thereof. * * *

"It remains only to consider those questions which present the point whether, in enacting a statute to define and punish an offense against the law of nations, it is necessary, in order 'to define' the offense, that it be declared in the statute itself

³⁰ Article 1, § 8, cl. 10.

to be 'an offense against the law of nations.' This statute defines the offense, and if the thing made punishable is one which the United States are required by their international obligations to use due diligence to prevent, it is an offense against the law of nations. Such being the case, there is no more need of declaring in the statute that it is such an offense than there would be in any other criminal statute to declare that it was enacted to carry into execution any other particular power vested in the government of the United States. Whether the offense as defined is an offense against the law of nations depends on the thing done, not on any declaration to that effect by Congress."³¹

The opinion of the Supreme Court of the United States is "that the laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations or the general doctrines of national law."³² An act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains, and, consequently, can never be construed to violate neutral rights, or to affect neutral commerce further than is warranted by the law of nations as understood in this country."³³ The intercourse of the United States "with foreign nations and its policy in regard to them, are placed by the Constitution of the United States in the hands of the government, and its decisions upon these subjects are obligatory on every citizen of the Union."³⁴ "Foreign municipal laws must indeed be proved as facts; but it is not so with the law of nations." The law of nations "in its full extent is part of the law of this state, and is to be collected from the practice of different nations, and the authority of writers."³⁵ In 1899

³¹ *United States v. Arjona*, 120 U. S. 479, 7 Sup. Ct. 628, 30 L. Ed. 728.

³² *Talbot v. Seeman*, 1 Cranch, 1, 2 L. Ed. 15; *The Amelia*, 4 Dall. 34, 1 L. Ed. 730; *The Charming Betsy*, 2 Cranch, 64, 2 L. Ed. 208.

³³ *The Charming Betsey*, 2 Cranch, 64, 2 L. Ed. 208; *Ex parte Blumer*, 27 Tex. 740.

³⁴ *Kennett v. Chambers*, 14 How. 38, 14 L. Ed. 316.

³⁵ *Respublica v. De Longchamps*, 1 Dall. 111, 1 L. Ed. 59; *The Scotia*, 14 Wall. 170, 20 L. Ed. 822. Vide also, *Thirty Hogsheads of Sugar v. Boyle*, 9 Cranch, 191, 3 L. Ed. 701; *United States v. The*

the United States Supreme Court said that it would be bound "to take judicial notice of, and give effect to," a rule of international law, "in absence of any treaty or other public act of their government in relation to the matter."³⁶

Active, 24 Fed. Cas. 759; *The Nereide*, 9 Cranch, 388, 3 L. Ed. 769; *The New York*, 175 U. S. 187, 20 Sup. Ct. 67, 44 L. Ed. 126.

³⁶ *The Paquete Habana*, 175 U. S. 677, 20 Sup. Ct. 290, 44 L. Ed. 320.

WILS.INT.L.—2

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PART I

PERSONS IN INTERNATIONAL LAW

WILS.INT.L.

(19)*

CHAPTER I.

PERSONS IN INTERNATIONAL LAW.

6. Status.
7. States in International Law.
8. Definition of State.
9. Acquisition of International Status.
10. Recognition of International Status.
11. Persons Having Limited Status.
12. States Outside the Family of Nations.
13. Neutralized States.
14. Members of Political Unions.
15. Protected States.
16. Belligerents.
17. Recognition of Belligerency.
18. Insurgents.
19. Loss or Modification of Status.

STATUS.

6. The status of persons in international law may vary as in other branches of law according to their rights, liabilities, and disabilities.

A state is regarded as having full legal status.

Various other unities are accorded a limited status, such as belligerents in time of war, political unities under protectorates, etc.

Status may be determined by policy of one or more states or by public law. Turkey, after a de facto existence of many years, was formally admitted to international statehood by the Treaty of Paris, 1856. Insurrectionists recognized as belligerents obtain definite legal status, giving them, so far as hostilities are concerned, the same privileges as the state against which they are waging war. Sweden-Norway, a personal union from 1815, became two kingdoms in 1905. While the physical, moral, ethnic, or other conditions may not change, and while the reason may not always be evident for the granting of international status where it had not previously existed, yet when once granted the rights of the status must be conceded.

STATES.

7. Only states in the strict sense of the word are recognized as full legal persons in international law.

A recognized belligerent has a qualified status, limited to the conduct of warfare, or a protectorate may have certain rights which have not passed to the protector; but full international status appertains only to states in the strict sense of the word, as distinguished from the use of the term to designate political divisions; e. g., Maine, New Hampshire, Vermont, etc., in the United States. The only state on the American continent north of Mexico which international law recognizes is the United States of America.

DEFINITION OF STATE.

8. A state is a sovereign political unity.

Concretely viewed, a state is a body politic possessing sovereignty.

The word "state" has had many definitions. Some of these predicate of it physical, moral, ethnic, numerical, social, or other attributes. State is, however, a political concept, and the characteristics sometimes attributed to it may be conditions of its existence, but are not in themselves essential to a state. The definition given by Grotius is rather of a unity to be hoped for than of a state as existing in his day or since: "A state is a perfect body of freemen associated for the enjoyment of rights and of common advantages."¹

From the point of view of international law recognized political sovereignty is the test of statehood. Any body politic possessing sovereignty is entitled to be called a state. The definition, "A state is a sovereign political unity," implies that the unity is not necessarily of any particular form, but must be political and sovereign; i. e., must be "for public ends as understood in the family of nations," in distinction from pri-

¹ Est autem civitas coetus perfectus liberorum hominum, juris fruendi et communis utilitatis causa sociatus. De Jure Belli ac Pacis, Lib. I, cap. I, XIV, 1.

vate ends, as in a commercial company, and the unity must be self-sufficient and self-determining. Territory and population are conditions necessary for the existence of a state as for any other social institution; e. g., the church or family.

The form of the internal organization of a state, the relations of its parts, and the like, have often received much attention in books on international law. Such matters, however, belong to the field of constitutional and other branches of public law, rather than to international law, which is more concerned with the external relationship than with the form of internal organization. There is for international law no distinction between monarchy and republic, confederation and federation, simple and composite states. It may be necessary for diplomats to know how far a given organ of state has authority to act for the state—e. g., an Emperor or President; but this relates to constitutional rather than international law.

As Phillimore says: "It is a sound general principle, and one to be laid down at the threshold of the science of which we are treating, that international law has no concern with the form, character, or power of the constitution or government of a state, with the religion of its inhabitants, the extent of its domain, or the importance of its position and influence in the commonwealth of nations."²

A state *de facto* may possess full right to regulate its internal affairs without interference from any foreign state, internal sovereignty; but this does not make the state a person in the family of nations. To be a member of the family of nations a state must be recognized as such by those already within the international circle. From the time of such recognition, the state is regarded as in possession of external sovereignty.

There has been much discussion as to the Holy See. Some claim that it is a full state; others deny it such position. Certainly the Pope has been, and is, even by the Italian Law of Guaranty of May 13, 1871, regarded as having the attributes commonly possessed by sovereigns. He possesses inviolability. He is exempt from foreign jurisdiction. He receives the honors of a sovereign. He has the right to send

² 1 Phillimore, *International Law*, LXIII, p. 81.

and to receive diplomatic agents. The area over which he exercises temporal jurisdiction is very limited, and the jurisdiction is qualified.³

ACQUISITION OF INTERNATIONAL STATUS.

- 9. A *de facto* state, possessing all the necessary characteristics required by constitutional law for full statehood, may exist, and yet such a state may not have full status in international law. This status is acquired at the present time on admission to the number of states now regarded as constituting the family of nations.**

The entrance of the state into international statehood, however, depends entirely upon the recognition by those states already within this circle. Whatever advantages membership in this circle may confer, and whatever duties it may impose, do not fall upon the new state until its existence is generally recognized by the states already within the international circle. These advantages and duties, as between the recognizing and recognized state, immediately follow recognition, but do not necessarily extend to other states than those actually party to the recognition. The basis of this family of nations or international circle, which admits other states to membership, is historical, resting on the polity of the older European states. These states, through the relations into which they were brought by reason of proximity and intercourse, developed among themselves a system of action in their mutual dealings; and international law in its beginning proposed to set forth what this law was and should be. This family of states could not permit new accessions to its membership, unless these new states were properly constituted to assume the mutual relationships, and as to the proper qualifications for admission in each case the states already within the family claim and exercise the right to judge.⁴

Other states were from time to time and in various ways recognized as members of the family of nations. The family

³ For bibliography in regard to the Holy See, Bonfils, *Droit International Public*, §§ 370, ff.

⁴ Wilson & Tucker, *Int. Law* (5th Ed.) § 22, p. 47.

was at first European, and its law European. Gradually the group admitted new members; these new members acknowledging the existing law as binding. The United States of America was the earliest addition outside of Europe; but the United States adopted for the most part the international law of the European family. As Hamilton said: "Ever since we have been an independent nation, we have appealed to and acted upon the modern law of nations as understood in Europe. Various resolutions of Congress during our Revolution, the correspondence of executive officers, the decisions of our courts of admiralty, all recognized this standard."⁵ Other American states similarly became members of the family of nations.

In the early days, also, international law was regarded as limited to Christian states, though, as declared by the five powers in 1818, it was "their invariable resolution never to depart, either among themselves or in their relations with other states, from the strictest observation of the principles of the rights of nations."⁶ In 1856, however, the five great powers of that day admitted the Turkish Empire to "the participation in the advantages of European public law and concert." The entrance of Japan into the family of nations in 1899 added another non-European state to the international circle.⁷

⁵ Letters to Camillus, No. 20, 5 Hamilton's Works (Lodge's Ed.) 89.

⁶ 1 Hertzslet, 574.

⁷ "The treaty of commerce and navigation between the United States and Japan on November 22, 1894, took effect in accordance with the terms of its XIXth article on the 17th of July last, simultaneously with the enforcement of like treaties with the other powers, except France, whose convention did not go into operation until August 4th; the United States being, however, granted up to that date all the privileges and rights accorded to French citizens under the old French treaty. By this notable conventional reform Japan's position as a fully independent sovereign power is assured; control being gained of taxation, customs revenues, judicial administration, coasting trade, and all other domestic functions of government, and foreign extraterritorial rights being renounced." Message of President McKinley, Dec. 5, 1899.

In accordance with the Emperor's orders, the Japanese ministers of state issued instructions in regard to the operation of treaties

RECOGNITION OF INTERNATIONAL STATUS.

10. Recognition is the act which gives to a de facto state international status.

Recognition is the act of the department of government intrusted with authority in foreign affairs, and makes the parties equal as regards international law. Recognition is usually regarded as a deliberate act, which is irrevocable.

Recognition of a new state is uniformly regarded as an act reserved to the department of government charged with the conduct of foreign affairs. As is said by the Supreme Court of the United States: "Who is the sovereign, de jure or de facto, of a territory, is not a judicial, but a political question, the determination of which by the legislative and

admitting Japan to the family of nations. The following is an example:

"Cabinet Notification No. 1.

"The work of revising the treaties has caused deep solicitude to His August Majesty since the centralization of the government, and has long been an object of earnest desire to the people. More than twenty years have elapsed since the question was opened by the dispatch of a special embassy to the West in 1871. Throughout the whole of that interval, various negotiations were conducted with foreign countries and numerous plans discussed, until finally, in 1884, Great Britain took the lead in concluding a revised treaty, and the other powers all followed in succession, so that now the operation of the new treaties is about to take place on the 17th of July and the 4th of August.

"The revision of the treaties, in the sense of placing on a footing of equality the intercourse of this country with foreign states, was the basis of the great liberal policy adopted at the time of the restoration, and that such a course conduces to enhance the prestige of the Empire and to promote the prosperity of the people is a proposition not requiring demonstration. But, if there should be anything defective in the methods adopted for giving effect to the treaties, not merely will the object of revision be sacrificed, but also the country's relations with friendly powers will be impaired, and its prestige may be lowered. It is, of course, beyond question that any rights and privileges accruing to us as a result of treaty revision should be duly asserted. But there devolves upon the government of this Empire the responsibility, and upon the people of this realm the duty, of protecting the rights and privileges of foreigners, and

executive departments of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government. This principle has always been upheld by this court, and has been affirmed under a great variety of circumstances.⁸ * * * It is equally well settled in England."⁹

Recognition, of course, would not be withheld from a state formed by the voluntary union of two or more previously recognized states, as this recognition could not be regarded by any other state as premature or otherwise improper. Such recognition took place when the German Empire was established in 1871.

Likewise there is no offense in the recognition of states which come into being through the peaceful dissolution of

of sparing no effort that they may one and all be enabled to reside in the country confidently and contentedly. It behooves all officials to clearly apprehend the august intentions, and to pay profound attention to these points.

"Marquis Yamagata, Minister President of State.

"July 1, 1899."

Foreign Relations U. S., 1899, p. 469.

⁸ Can there be any doubt that when the executive branch of the government, which is charged with our foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view it is not material to inquire, nor is it the province of the court to determine, whether the executive be right or wrong. It is enough to know that in the exercise of his constitutional functions he has decided the question. Having done this under the responsibilities which belong to him, it is obligatory on the people and government of the Union. *Williams v. Suffolk Ins. Co.*, 13 Pet. 415, 10 L. Ed. 226; *Jones v. United States*, 137 U. S. 202, 11 Sup. Ct. 80, 34 L. Ed. 691; *Gelston v. Hoyt*, 3 Wheat. 246, 4 L. Ed. 381; *United States v. Palmer*, 3 Wheat. 610, 4 L. Ed. 471; *The Divina Pastora*, 4 Wheat. 52, 4 L. Ed. 512; *Foster v. Neilson*, 2 Pet. 253, 7 L. Ed. 415; *Keene v. McDonough*, 8 Pet. 308, 8 L. Ed. 955; *Garcia v. Lee*, 12 Pet. 511, 9 L. Ed. 1176; *United States v. Yorba*, 1 Wall. 412, 17 L. Ed. 635; *United States v. Lynde*, 11 Wall. 632, 20 L. Ed. 230.

⁹ *The Pelican*, Edw. Adm. appx. D; *Taylor v. Barchlay*, 2 Sim. 213; *Emperor of Austria v. Day*, 3 De G., F. & J. 217, 221, 233; *Republic of Peru v. Peruvian Guano Co.*, 36 Ch. D. 489, 497; *Republic of Peru v. Dreyfus*, 38 Ch. D. 348, 356, 359.

previously existing bonds of union, as in the case of Sweden and Norway in 1905.¹⁰

There is greater possibility of misunderstanding in case recognition is given to a state that comes into being through disruption of previously existing bonds by force of arms. Such recognition is a question of policy, and, if premature, may be

¹⁰ Foreign Relations U. S., 1905, pp. 853-874.

Some of the questions arising in consequence of dissolution of the union of Sweden and Norway are considered in the following memorandum of the Secretary of State of the United States:

"The Secretary of State to the Japanese Minister.

"Department of State, Washington, November 10, 1905.

"The Secretary of State has considered the questions in regard to the treaties of Sweden and Norway and the diplomatic and consular relations of those countries with other powers propounded in the memorandum left with him by the Japanese minister on the 9th instant.

"The first and second points therein brought up remain for future adjustment. The views of this government as to their treatment may be thus stated. The queries are:

"(1) Are the treaties hitherto concluded and existing between the United Kingdom of Sweden and Norway and other powers to be considered to have ceased to be valid at this juncture so far as regards Norway, and has Norway temporarily to lose its treaty relations with such other powers?

"(2) Are such treaties as referred to above to be considered valid so far as regards Sweden?"

"The treaty of 1816, which was terminated in 1826, and that of 1827, still extant, were concluded by the United States with the sovereign of Sweden and Norway, acting on behalf of each country. Sweden and Norway are not therein described as a united kingdom; but the obligations contracted and privileges granted by their common king are separately specified in each instance as to the territories, shipping, and commerce of each country. This government would regard the treaty provisions in regard to Norway and to Sweden as severally binding upon each country and unaffected by the dynastic change in Norway. In point of fact the government of Norway and the government of Sweden have hitherto acted independently in execution of their treaty engagements, each within its sovereign jurisdiction. In the matter of extradition the United States has concluded separate treaties with the governments of Norway and of Sweden.

"(3) Are the diplomatic agents and consular officers hitherto accredited by the United Kingdom of Sweden and Norway to the other

regarded by the previously existing government as a cause for war. The recognition of the United States of America by France in 1778 was premature, and was practically an alliance against Great Britain.¹¹

powers to be hereafter recognized as the diplomatic agents and consular officers of Sweden?

"This government has been notified by the government of Norway that the functions of the diplomatic representatives of Sweden and Norway have ceased, ipso facto, so far as Norway is concerned, and that representatives of Norway will be appointed. It is understood that the Swedish government regards its diplomatic agents as the representatives of the sovereign, and that with the termination of the king's sovereignty over Norway his ministers cease to represent Norway, but that their representation of Sweden is unaffected thereby, and that no new credentials are needed. It is presumed that each country holds the same position with regard to its consular representatives.

"(4) Are the diplomatic agents and consular officers hitherto accredited by foreign powers to the United Kingdom of Sweden and Norway to be recognized hereafter as the diplomatic agents and consular officers of Sweden alone? If so, is it not required at this juncture to renew the credentials presented to the king of Sweden and Norway by the diplomatic agents of foreign powers, or to take any such course in order to continue the terms of office of these diplomatic agents and consular officers as are accredited to Sweden alone?"

"The United States will, upon provision therefor by the Congress, accredit a diplomatic representative to Norway.

"As under our constitutional system the President is not a sovereign, but the mandatory of the sovereign powers of the states of the Union, the relations of the United States with foreign countries are as between government and government, rather than as between sovereign and sovereign. Consequently the United States will in due time accredit its diplomatic representative to Sweden alone; but in the meanwhile it is disposed to regard its present minister as dually accredited to the two kingdoms, and therefore competent to transact affairs with the government of Norway. As the consuls of the United States in Sweden and Norway act under exequaturs defining their territorial jurisdiction, it is not thought necessary to seek a new exequatur for a consul who already has a Norwegian exequatur. A consul who has a Swedish exequatur is, of course, unaffected by the change."

¹¹ Treaty of February 6, 1778, between France and the United States:

"Article I. If war should break out between France and Great Britain during the continuance of the present war between the

While recognition must proceed from the political department of the government of the recognizing state, there is no fixed method in accord with which recognition should be given. Recognition may be a formal state act, as by treaty, proclamation, declaration, or implied, from the reception or sending of a diplomatic agent, the grant of an exequatur, the official salute of the flag,¹² or other act of similar significance.

The recognition may be individual by one state, as in the case of the recognition of the United States by the Netherlands in 1782, or collective, by a group of states, as in the case of the Congo Free State at the Conference of Berlin in 1884.

Recognition of a state is irrevocable and absolute, unless granted under specific reservations or conditions.

In 1903 the United States recognized Panama as a state. On occasion of the presentation of his letter of credence on November 13th, the Minister of Panama said:

"Mr. President: In according to the minister plenipotentiary of the Republic of Panama the honor of presenting to you his letters of credence, you admit into the family of nations the weakest and the last-born of the republics of the New World."

The President in his reply said:

"Mr. Minister: I am much gratified to receive the letters whereby you are accredited to the government of the United States in the capacity of envoy extraordinary and minister plenipotentiary of the Republic of Panama.

"In accordance with its long-established rule, this government has taken cognizance of the act of the ancient territory of Panama in reasserting the right of self-control, and, seeing in the recent events on the Isthmus an unopposed expression of the will of the people of Panama and the confirmation of their declared independence by the institution of a *de facto* government, republican in form and spirit, and alike able and resolved to discharge the obligations pertaining to sovereignty,

United States and England, His Majesty and the said United States shall make it a common cause and aid each other mutually with their good offices, their counsels and their forces, according to the exigence of conjunctures, as becomes good and faithful allies."

¹² Declaration of the United States, April 22, 1884.

we have entered into relations with the new republic. It is fitting that we should do so now, as we did nearly a century ago when the Latin peoples of America proclaimed the right of popular government; and it is equally fitting that the United States should, now as then, be the first to stretch out the hand of fellowship and to observe toward the new-born state the rules of equal intercourse that regulate the relations of sovereignties toward one another."¹³

It is usually maintained that recognition of statehood by the family of nations, though subsequent to the time when the recognized state has declared its independence, does not determine the date of the beginning of the state recognized. As was said in the Supreme Court of the United States in 1796:

"From the 4th of July, 1776, the American states were de facto, as well as de jure, in the possession and actual exercise of all the rights of independent governments. * * * I have ever considered it as the established doctrine of the United States that their independence originated from and commenced with the declaration of Congress, on the 4th of July, 1776, and that no other period can be fixed on for its commencement, and that all laws made by the Legislatures of the several states, after the Declaration of Independence, were the laws of sovereign and independent governments."¹⁴

PERSONS HAVING LIMITED STATUS.

- 11. Political unities, not recognized by the family of nations as having full rights to determine their external relations, are regarded as having limited status as international persons.**

This limited status may be because recognition has never been given, has been qualified or suspended, or has been made the subject of special agreement. Persons having limited status include states not admitted to the family of nations, neutralized states, members of political unions, protected states, and some others, entities under special circumstances, as in the case of recognized belligerents.

¹³ Foreign Relations U. S., 1903, p. 245.

¹⁴ Ware, Adm'r of Jones, v. Hylton et al., 3 Dall. 199, 224, 1 L. Ed. 568.

STATES OUTSIDE THE FAMILY OF NATIONS.

- 12. States not yet admitted to the family of nations may have all the attributes of states, in the sense of public law and from the point of view of political science, and yet lack international statehood.**

Asia has furnished numerous instances of political unities which have not been recognized by the family of nations as states in the sense of international law. Such states have not been invited as of right to international conferences, though often some have been invited from courtesy. They have not been allowed to exercise certain rights over foreigners within their own jurisdiction. Such restrictions frequently appear in the grant of special judicial authority to consuls of the states of the family of nations accredited to Asiatic states. Article IV of the treaty of November 17, 1880, between the United States and China provides that: "When controversies arise in the Chinese Empire between citizens of the United States and subjects of His Imperial Majesty, which need to be examined and decided by the public officers of the two nations, it is agreed between the governments of the United States and China that such cases shall be tried by the proper official of the nationality of the defendant."

NEUTRALIZED STATES.

- 13. A neutralized state is one which by international agreement is bound to abstain from offensive hostilities and from acts which would involve such hostilities.**

Neutralization usually has for its object the guarantee of the peace of the neutralized area. The neutralized state may enter into treaties or agreements with other states which would involve only peaceful relations, but must not resort to war, unless for its own defense. In return for this abstinence the neutralized state is guaranteed in its security and integrity.¹⁵

¹⁵ By the declaration of the eight powers on March 20, 1815, to which Switzerland acceded May 27, 1815, it was set forth:

"That as soon as the Helvetic Diet shall have duly and formally

The Convention for the Neutralization of Switzerland was signed by six powers in 1815; of Belgium by six powers in 1839; of the Ionian Islands by five powers in 1863, and by four powers in 1864; of Luxemburg by eight powers in 1867; and of the Congo Free State by fourteen powers in 1884.

The degree of power residing in a neutralized state may be determined by the treaty by which it is given its status, or may be left without specific statement.

Neutralization does not necessarily detract from the position of honor to which a state is entitled in the family of nations, though restricting the right to undertake hostilities, except for defense of its dominion.

MEMBERS OF POLITICAL UNIONS.

14. The status of members of political unions varies as the nature of the union is more or less complete. Such unions include:

- (a) Personal unions.**
- (b) Real unions.**
- (c) Confederations.**
- (d) Federal unions.**

In general, the relationships of members of political unions belong rather to the field of constitutional law than to inter-

acceded to the stipulations contained in the present instrument, an act shall be prepared containing the acknowledgment and the guarantee, of the part of all the powers, of the perpetual neutrality of Switzerland, in her new frontiers." 1 Hertslet, Map of Europe, by Treaty, p. 65.

The treaty of London, November 15, 1831, between the five powers and Belgium, provided:

"Art. VII. Belgium within the limits specified in articles I, II, and IV, shall form an independent and perpetually neutral state. It shall be bound to observe such neutrality towards all other states."

"Art. XXVI. In consequence of the stipulations of the present treaty there shall be peace and friendship between their majesties the King of the United Kingdom of Great Britain and Ireland, the Emperor of Austria, the King of the French, the King of Prussia, and the Emperor of all the Russias, on the one part, and his majesty the King of the Belgians on the other part, their heirs and successors, their respective states and subjects, forever." 2 Hertslet, Map of Europe by Treaty, p. 863.

national law. Yet in some cases the members of the union may possess a qualified international status, even after the union.

(a) The term "personal union" is applied to such states as, even though having distinct governmental organizations and international personalities, are under a single head. There have been numerous instances of such unions. One of the longest in history was that of Great Britain and Hanover, from 1714 to 1837, when the union ceased on the accession of Victoria, who under Hanoverian law would not be the next in line of succession.

The union of the Netherlands and the Grand Duchy of Luxemburg similarly ceased in 1890 on the death of William III and the accession of Wilhelmina.¹⁶ The Belgian Legislature in 1885 authorized Leopold II of Belgium to assume the sovereignty of the Congo Free State. The union was, however, to be purely personal.

(b) When the union is not merely personal, but also such that, for foreign relations, there is in the main only a single international personality, there is said to be a real union. Sweden and Norway from 1815 to 1905, and Austria and Hungary since 1867, are examples of such unions.

(c) In a confederation the international personality of the members may not be destroyed, though it may be limited, and in the person of the confederation a new unity may appear. The German Confederation from 1815 to 1866, and the United States of America from 1781 to 1789, afford examples of confederation.

(d) When the external sovereignty of several states passes to a central organization, which has the power to exercise this sovereignty, a federation or federal union arises. The United States of America since 1789, Switzerland, and several of the Central and South America states are of this form.

The German Empire since 1871 has for international law possessed certain characteristics of both federation and confederation; e. g., some of the states of the Empire have the right of legation, the right to grant exequaturs, and a limited

¹⁶ This union was instituted under the Family Compact of July 20, 1783. 4 Hertslet, 3289.

right to make conventions with foreign powers. The Emperor, however, for most matters, represents the German Empire.

PROTECTED STATES.

- 15. When a state resigns the control of a part of its sovereign functions to another state, or to other states, it is under a protectorate. The degree of authority exercised by the protecting state varies greatly in different cases.**

The existence of a state is not destroyed by coming under a protecting state, though it is often a step toward annexation by the protecting state.

The tiny republic of Andorra, about twenty by thirty miles in area, in the Pyrenees, has for more than six hundred years been under a joint Franco-Spanish protectorate. The republic of San Marino, about thirty-two square miles in area, is another survival from early times, and is now under the protection of Italy.¹⁷ The Principality of Monaco was also for many years under the protection of Spain, France, or Italy; but since 1861 this protection has not been exercised. The Ionian Islands were under British protection from 1815 to 1863.

Outside of Europe, particularly in Africa, protectorates of the most diverse character have been established or claimed. Many of these have already become parts of the protecting state and have lost their international status. By the agreement of 1884 Great Britain assumed a protectorate over the South African Republic as regard most foreign affairs. This was terminated by war and absorption in 1902, when the former republic became a part of the British Empire. France claimed a protectorate over Madagascar by the treaty of 1885. The United States and Great Britain acknowledged the existence of the protectorate in 1890, and Madagascar with the

¹⁷ Article XXXVIII of the Convention between Italy and San Marino of March 27, 1862, states that "the Republic of San Marino, having every reason to trust that it will never be deprived of His Majesty the King of Italy's protecting friendship for the preservation of its very ancient liberty and independence, declares that it will not accept the protection of any other power whatever."

islands dependent was declared a French colony in 1896. A treaty of 1889 between Abyssinia and Italy was interpreted by Italy as establishing a protectorate over Abyssinia; but Abyssinia denied this. In 1895 an armed struggle broke out, and as a result Italy recognized, in the treaty of October 26, 1896, "the independence, absolute and without reserve, of the Empire of Ethiopia."

In certain instances colonies, protectorates, or other possessions are granted in international negotiations a large measure of equality with full states. The Berlin International Wireless Telegraph Convention of 1906 provides for the representation and admission of "Colonies, Possessions, or Protectorates."¹⁸

¹⁸ The Final Protocol of the Berlin International Wireless Telegraph Convention of November 3, 1906, provides:

"I.

"The high contracting parties agree that at the next conference the number of votes which each country shall have (article 12 of the convention) shall be determined at the outset of the deliberations, so that the colonies, possessions, or protectorates admitted to the enjoyment of votes may be able to exercise their right of voting throughout all the proceedings of the conference.

"The decision arrived at shall have immediate effect, and shall remain in force until it is varied by a later conference.

"So far as the next conference is concerned, proposals for admission of new votes in favor of colonies, possessions, or protectorates which may have adhered to the convention shall be addressed to the International Bureau six months at least before the date of meeting of that conference. These proposals shall immediately be notified to the other contracting governments, which may, within a period of two months from the receipt of the notification, put forward similar proposals."

"V.

"The adhesion to the convention of the government of a country having colonies, possessions, or protectorates does not imply the adhesion of its colonies, possessions, or protectorates, in the absence of a declaration to that effect on the part of such government. A separate adhesion or a separate denunciation may be made in respect of the whole of such colonies, possessions, or protectorates, taken together, or in respect of each of them separately, under the conditions laid down in articles 16 and 22 of the convention.

"It is understood that stations on board ships having their port of registry in a colony, possession, or protectorate may be deemed to be subject to the authority of such colony, possession, or protectorate."

The status of a political unity under a protecting state may be that of almost complete independence, or of such dependence as to deprive it of any standing as a person in international law, even though the protected state may have control of its internal affairs.¹⁹

A political unity which has only the powers granted to it by the state of which it is a part, and is in general involved in the consequences of any action which the superior may take, is usually regarded as under a suzerain, and as having no international status.

The degrees of international relationship vary so much, however, that it is not always possible to agree whether a given instance is of the nature of a protectorate or of a suzerainty, and sometimes characteristics of both may clearly appear.

Egypt, by firman of June 8, 1873, may make commercial

¹⁹ By an agreement between France, Great Britain, Italy, and Russia in 1898, Crete was made an autonomous state under a High Commissioner of the Powers, not paying tribute, but under the suzerainty of the Sultan. The foreign relations were to be controlled by representatives of the four powers.

Japan assumed control over foreign relations of Corea by agreement of November 17, 1905, in which Corea covenants "not to conclude hereafter any act or engagement having an international character except through the medium of the government of Japan."

By the treaty between the United States and Cuba, signed May 22, 1903, the relations of these two states are shown:

"Article I. The government of Cuba shall never enter into any treaty or other compact with any foreign power or powers which will impair or tend to impair the independence of Cuba, nor in any manner authorize or permit any foreign power or powers to obtain by colonization or for military or naval purposes, or otherwise, lodgment in or control over any portion of said island.

"Article II. The government of Cuba shall not assume or contract any public debt to pay the interest upon which, and to make reasonable sinking-fund provision for the ultimate discharge of which, the ordinary revenues of the Island of Cuba, after defraying the current expenses of the government, shall be inadequate.

"Article III. The government of Cuba consents that the United States may exercise the right to intervene for the preservation of Cuban independence, the maintenance of a government adequate for the protection of life, property, and individual liberty, and for discharging the obligations with respect to Cuba imposed by the Treaty of Paris on the United States, now to be assumed and undertaken by the government of Cuba."

treaties and maintain an army, but pays tribute to the Sultan of Turkey. In 1878 a dual control over Egyptian finances was assumed by Great Britain and France. In 1881, owing to unsettled conditions and the stress upon France elsewhere, Great Britain entered upon a "temporary occupation" of Egypt, which, continuing since that time, has given to Egypt a large degree of British administration. Even under these conditions Great Britain made a convention with Egypt, January 19, 1899, by which Anglo-Egyptian Soudan is to be administered by a Governor-General, appointed by Egypt with the assent of Great Britain, and in the territory under this condominium the British and Egyptian flags are to be used together. By the Anglo-French declaration of April 8, 1904, respecting Egypt and Morocco, "the government of the French Republic for their part declare (as regards Egypt) that they will not obstruct the action of Great Britain in that country by asking that a limit of time be fixed for the British occupation or in any other way." Thus a political unity, from earliest times subject to many vicissitudes, while under a suzerain, is "temporarily occupied" by a foreign state, which, while "occupying," concludes a convention with it in regard to the government of outside territory, and also makes an agreement with another foreign state as to freedom from restriction as to "occupancy" and in other matters.

One of the most attenuated relations somewhat analogous to a protectorate is that established by a treaty of Germany, Great Britain, France, Norway, and Russia of November 2, 1907, by which Norway undertakes "not to cede any portion of the territory of Norway to any power to hold on a title founded either on occupation or on any other ground whatsoever." The other powers "recognize and undertake to respect the integrity of Norway."

"If the integrity of Norway is threatened or impaired by any power whatsoever, the German, French, British, and Russian governments undertake, on the receipt of a previous communication to this effect from the Norwegian government, to afford to that government their support, by such means as may be deemed the most appropriate, with a view to safeguarding the integrity of Norway."

Much has been written upon the nature of the relationship in cases of protectorate or suzerainty, which particularly shows how diverse are the conditions and how impossible in definition is precision sufficient to cover all cases.

In practice it is recognized, also, that certain political unities not possessing sovereignty and certain other bodies have a limited status as persons in international law.

BELLIGERENTS.

16. When states engage in armed conflict, those thus engaged are called "belligerents." The laws of war and neutrality come into operation.

These laws may also become operative when a community by force of arms attempts to free itself from the jurisdiction of the parent state, or when a state within the family of nations engages in war against a community outside the family. Both belligerents, so far as belligerency is recognized, have a like status as regards international law relating to the conduct of hostilities.

The recognition of the belligerency of independent states does not affect the existence of the states, or create new unities having international status.

The recognition of the belligerency of a community in revolt against the parent state gives, so far as the recognizing state is concerned, to the revolting community the same international status as regards the conduct of the war as is possessed by the parent state, and to that extent recognizes a new international unity. Similarly the recognition of the existence of belligerency between a state and a community outside the family of nations makes the community an international person as regards the conduct of war. As was said in the case of *The Three Friends* in 1897, "agreeably to the principles of international law and the reason of the thing, the recognition of belligerency, while not conferring all the rights of an independent state, concedes to the government recognized the rights, and imposes upon it the obligations, of an independent state in matters relating to the war being waged."²⁰

²⁰ 166 U. S. 1, 17 Sup. Ct. 495, 41 L. Ed. 897.

RECOGNITION OF BELLIGERENCY.

17. (a) Recognition of the belligerency of a revolting community by a foreign state is an act of the political department of the government of the recognizing state, and if premature, or without reasonable grounds, may be regarded by the parent state as cause for war. Such recognition gives to the recognized revolting community a legal war status as regards the recognizing state.

(b) Recognition of belligerency of a revolting community by the parent state gives the revolting community a general war status as regards all states.

(a) Recognition of belligerency of a revolting community by a foreign state is not obligatory, but when once granted gives rise to new legal relations, which cannot justly be disclaimed during the continuance of the conditions under which they were assumed. As the relations may affect other states, particularly the parent state, recognition, once granted, is generally held to be irrevocable.²¹

As recognition brings such consequences, it is a matter wholly within the competence of the political department of the government, and by the action of this department all other departments are bound.²²

The method by which recognition is accorded to a revolting community by a foreign state is usually by the issue of a declaration of neutrality, though some states make known their position by other formal action.²³

²¹ 1 Moore, *International Law Digest*, pp. 164-205, §§ 59-71.

²² "But it belongs to the political department to determine when belligerency shall be recognized, and its action must be accepted according to the terms and intention expressed." *The Three Friends*, 166 U. S. 1, 17 Sup. Ct. 495, 41 L. Ed. 897; *U. S. v. One Hundred Barrels of Cement*, 27 Fed. Cas. 292.

²³ Great Britain recognized the belligerency of the Confederate States of America in the proclamation of May 13, 1861:

"Whereas, we are happily at peace with all sovereign powers and states;

"And whereas, hostilities have unhappily commenced between the government of the United States of America and certain states styling themselves the Confederate States of America;

"And whereas, we, being at peace with the government of the

Recognition of the belligerency of a revolting community by a foreign state before that community has shown its ability to resist in an orderly manner the forces of the parent state, or when the relations of the recognizing state are not to any considerable extent disturbed, is usually regarded by the parent state as premature, and as an evidence of an unfriendly disposition on the part of the recognizing state.

Recognition releases the parent state from all responsibility to the recognizing state for acts of recognized belligerents. The recognizing state may hold the belligerent community responsible for its acts, if the community establishes its independence. If the belligerent community fails to establish itself, the recognizing state can hold no one responsible for acts of the revolting community subsequent to the date of recognition of belligerency. After recognition of belligerency the revolting community has as regards the recognizing state the same war status as the parent state. Such recognition does not, however, affect their relations to other states.

The note of Dana in his edition of Wheaton of 1866 contains a brief statement of the principles which since that time have in the main been followed:

"The occasion for the accordance of belligerent rights arises when a civil conflict exists within a foreign state. The reason which requires, and can alone justify, this step by the government of another country, is that its own rights and interests are so far affected as to require a definition of its own relations to the parties. Where a parent government is seeking to subdue an insurrection by municipal force, and the insurgents claim a political nationality and belligerent rights, which the parent government does not concede, a recognition by a for-

United States, have declared our royal determination to maintain a strict and impartial neutrality in the contest between the said contending parties:

"We, therefore, have thought fit, by (and with) the advice of our Privy Council, to issue this our royal proclamation.

"And we do hereby strictly charge and command all our loving subjects to observe a strict neutrality in and during the aforesaid hostilities, and to abstain from violating or contravening either the laws and statutes of the realm in this behalf or the law of nations in relation thereto, as they will answer to the contrary at their peril."

eign state of full belligerent rights, if not justified by necessity, is a gratuitous demonstration of moral support to the rebellion, and of censure upon the parent government. But the situation of a foreign state with reference to the contest, and the condition of affairs between the contending parties, may be such as to justify this act. It is important, therefore, to determine what state of affairs, and what relations of the foreign state, justify the recognition.

"It is certain that the state of things between the parent state and insurgents must amount in fact to a war, in the sense of international law; that is, powers and rights of war must be in actual exercise. Otherwise the recognition is falsified, for the recognition is of a fact. The tests to determine the question are various, and far more decisive where there is maritime war and commercial relations with foreigners. Among the tests are the existence of a *de facto* political organization of the insurgents, sufficient in character, population, and resources, to constitute it, if left to itself, a state among the nations reasonably capable of discharging the duties of a state; the actual employment of military forces on each side, acting in accordance with the rules and customs of war, such as the use of flags of truce, cartels, exchange of prisoners, and the treatment of captured insurgents by the parent state as prisoners of war; and, at sea, employment by the insurgents of commissioned cruisers, and the exercise by the parent government of the rights of blockade of insurgent ports against neutral commerce, and of stopping and searching neutral vessels at sea. If all these elements exist, the condition of things is undoubtedly war; and it may be war before they are all ripened into activity."²⁴

²⁴ "The occasion for the accordance of belligerent rights arises when a civil conflict exists within a foreign state. The reason which requires and can alone justify this step by the government of another country is that its own rights and interests are so far affected as to require a definition of its own relations to the parties. Where a parent government is seeking to subdue an insurrection by municipal force, and the insurgents claim a political nationality and belligerent rights, which the parent government does not concede, a recognition by a foreign state of full belligerent rights, if not justified by necessity, is a gratuitous demonstration of moral support to the rebellion, and of censure upon the parent government. But the

(b) The parent state may recognize the belligerency of a revolting community by acts which imply the existence of war or by formal declaration. Either course may justify recognition by foreign states. The British proclamation of neutrality of May 14, 1861, was justified by President Lincoln's proclamation of a blockade on April 19, 1861, which announced that action against vessels permissible only in time of war would be taken by the United States.²⁵

INSURGENCY.

18. The status of insurgency is sometimes admitted in cases where there is within a state an organized body of men pursuing public ends by force of arms, and temporarily beyond the control of the civil authority.

The Constitution of the United States provides for the calling forth of the militia to suppress insurrections.²⁶ Messages of the Presidents have frequently mentioned that insurrections existed in foreign states.²⁷ Decisions of the courts, both in

situation of a foreign state with reference to the contest, and the condition of affairs between the contending parties, may be such as to justify this act. It is important, therefore, to determine what state of affairs, and what relations of the foreign state, justify the recognition." Wheaton, *International Law* (Dana's Ed.) p. 34, note 15. This was followed in President Grant's message of December 7, 1875, and by President McKinley December 6, 1897.

²⁵ "Now, therefore, I, Abraham Lincoln, President of the United States, * * * have deemed it advisable to set on foot a blockade of the ports within the states aforesaid in pursuance of the laws of the United States and of the law of nations in such case provided. For this purpose a competent force will be posted so as to prevent entrance and exit of vessels from the ports aforesaid. If, therefore, with a view to violate such blockade, a vessel shall approach, or shall attempt to leave, any of the said ports, she will be duly warned by the commander of one of the blockading vessels, who will indorse on her register the fact and the date of such warning; and if the same vessel shall again attempt to enter or leave the blockaded port, she will be captured and sent to the nearest convenient port, for such proceedings against her and her cargo as prize as may be deemed advisable."

²⁶ Article 1, § 8.

²⁷ See particularly the Presidents' messages from 1868 to 1878 and from 1895 to 1898.

the United States and foreign states, have admitted the existence of insurgency.²⁸ In 1896 the Supreme Court of the United States declared, in the case of *The Three Friends*: "The distinction between recognition of belligerency and recognition of a condition of political revolt, between recognition of the existence of war in a material sense and war in a legal sense, is sharply illustrated by the case before us. For here the political department has not recognized the existence of a *de facto* belligerent power engaged in hostility with Spain, but has recognized the existence of insurrectionary warfare prevailing before, at the time, and since this forfeiture is alleged to have been incurred." In 1895 President Cleveland issued a proclamation practically putting into operation the neutrality laws, though not declaring neutrality, as no belligerency had been recognized.²⁹ Frequent attempts have been made by the parent state to put those rebelling against its authority beyond the pale of law. Such claims have been uniformly resisted, though the right of revolution has been conceded.³⁰

It is fully established that decrees of the parent state putting those in insurrection against it beyond the pale of law, or condemning them to unusual treatment, are not binding upon foreign states. Such a decree may be regarded as an admission by the parent state of the existence of an insurrection within its borders. The legitimate government cannot in any way throw the burden of executing its decrees upon a foreign state. Even its decrees of closure in time of insurrection must be supported by sufficient force to render them effective.

The United States was early in the Civil War forced to give up the claims that the Confederate cruisers were piratical and that other forces were bands of outlaws.

Attempts were also made in 1885 to induce the United States to prevent the sale of arms to the Colombian insurgents, but Mr. Bayard said in a letter of March 25, 1885:

"That the existence of a rebellion in Colombia does not au-

²⁸ *The Three Friends*, 166 U. S. 1, 17 Sup. Ct. 495, 41 L. Ed. 897; *Underhill v. Hernandez*, 168 U. S. 250, 18 Sup. Ct. 83, 42 L. Ed. 456; *The Salvador*, L. R. 3 P. C. 218.

²⁹ Proclamation of June 12, 1895, 9 Richardson, Messages and Papers of the Presidents, 591.

³⁰ *Foreign Relations U. S.*, 1885, p. 212.

thorize the public officials of the United States to obstruct ordinary commerce in arms between citizens of this country and the rebellious or other parts of the territory of the Republic of Colombia.”³¹

Attempts have also been made by the parent state to obtain advantages of a blockade without the obligations of war through a proclamation declaring ports held by insurgents closed. Foreign states have, however, usually taken the position that such decrees are of no effect, and the ports in the hands of the insurgents are closed only to the extent to which an effective force may physically prevent entrance.

The parent state cannot prescribe the attitude which a foreign state shall assume toward insurgents. It is, however, within the competence of the foreign state to determine its own attitude toward insurgents, so far as this may accord with the laws of humanity and its obligations to a friendly state. The foreign state has full right to deny to the insurgents the right to exercise any belligerent rights toward its subjects. A foreign state, for example, would not be under any obligation to allow the exercise of the right of visit or search of its vessels, and, if its vessels were seized by insurgents, the war vessels of the foreign state might rescue them on the high seas. Admiral Benham, at the time of the Brazilian revolt of 1893-94 took a position which has been generally approved. He maintained that American merchant vessels in the harbor of Rio Janeiro were liable to risk if they came within the field of actual hostile operations during the continuance of an engagement, but that interference by insurgents with legitimate movements of American merchant vessels at other times would not be permitted.³²

Yet acts of the insurgents are liable to such penalties as the parent state may inflict. Foreign states do not generally take extreme measures against insurgents. They do not permit insurgents to exercise the right of visit and search on the high seas, as the obligation to submit to this interference with the

³¹ Foreign Relations U. S., 1885, p. 238.

³² Foreign Relations U. S., 1893, p. 116, ff. Admiral Benham's position was sanctioned in the opinion of the Institute of International Law in its session of 1901.

freedom of commerce rests upon a neutral only when there is war, and until there is war there can be no neutral in the sense of international law. The right of visit and search is, of course, denied during an insurrection to the parent state on the same grounds as to the insurgent.

As regards relations of insurgents and parent state, it may be said that they must so far as possible observe the rules of civilized warfare. This is expedient, in order that the parent state may maintain the respect of sister states, and in order that the insurgents may, if successful, be more readily admitted into the family of nations.

A foreign state would not permit the parent state to prescribe the attitude which the foreign government should assume toward its insurgent subjects. A foreign state would not permit the insurgents to prescribe what attitude the foreign government should assume toward other parties involved in the insurrection. Probably the most frequent action of this kind on the part of the insurgents is seen in the attempt of the insurgents to proclaim blockades. It is clear, however, that blockade is a war measure, and involves the existence of courts to pass upon its violations and to decree penalties. In absence of such responsible courts, a foreign state would not be under obligation to respect such insurgent proclamation.

As Secretary Hay said in a letter to the Secretary of Navy, November 15, 1902:

"It seems important to discriminate between the claim of a belligerent to exercise quasi sovereign rights in accordance with the tenets of international law and the conduct of hostilities by an insurgent against the titular government.

"The formal right of the sovereign extends to acts on the high seas, while an insurgent's right to cripple his enemy by any usual hostile means is essentially domestic within the territory of the titular sovereign whose authority is contested. To deny to an insurgent the right to prevent the enemy from receiving material aid cannot well be justified without denying the right of revolution. If foreign vessels carrying aid to the enemies of the insurgents are interfered with within the territorial limits, that is apparently a purely military act incident to the conduct of hostilities, and, like any other insurgent in-

terference with foreign property within the theater of insurrection, is effected at the insurgent's risk."

He also maintained that, "within the territorial limits of the country, the right to prevent the access of supplies to their enemy is practically the same on water as on land—a defensive act in the line of hostility to the enemy. But in no case would the insurgents be justified in treating as an enemy a neutral vessel navigating the internal waters; their only right being, as hostiles, to prevent the access of supplies to their domestic enemy. The exercise of this power is restricted to the precise end to be accomplished. No right of confiscation or destruction of foreign property in such circumstances could well be recognized, and any act of injury so committed against foreigners would necessarily be at the risk of the insurgents."³³

Balmaceda, in 1891, declared various ports of Chili closed. Some of the European states, as well as the United States, declined to respect the decree. If ports in the possession of the insurgents could be closed by decree, there would be a close analogy to the old idea of a paper blockade. The principle has come to be generally recognized that in time of insurrection closure, to be respected, must be by effective force.

A general agreement on the part of various states was shown in their attitude toward the Haitien insurgents in 1902. This is evident in the letter of the commander of the U. S. S. *Machias* to the insurgent commander on August 10, 1902. The letter was as follows:

"Sir: I wish to give you notice that I am charged with the protection of British, French, German, Italian, Spanish, Russian, and Cuban interests, as well as those of the United States. You are informed also that I am directed to prevent the bombardment of this city without due notice; also to prevent any interference with commerce by the interruption of telegraph cables or the stoppage of steamers engaged in innocent trade with a friendly power. All interference excepting with Haitien interests, I shall endeavor to prevent."

That insurgents have not belligerent status is sufficient reason for refusing to their vessels the rights of belligerents in foreign ports.

³³ International Law Situations, Naval War College, 1902, p. 79.

Section 4295 of the United States Revised Statutes (U. S. Comp. St. 1901, p. 2950) made it lawful for a private vessel to resist the aggression of an insurgent not yet recognized as a belligerent. This statute provides:

"The commander and crew of any merchant vessel of the United States, owned wholly or in part by the citizens thereof, may oppose and defend against any aggression, search, restraint, depredation or seizure which shall be attempted upon such vessel, or upon any other vessel so owned, by the commander or crew of any armed vessel whatsoever, not being a public armed vessel of some nation in amity with the United States, and may subdue and capture the same; and may also retake any vessel so owned which may have been captured by the commander or crew of any such armed vessel, and send the same into any port of the United States."

Insurgency may be regarded as a fact which is generally accepted in the international practice. The admission of this fact is by such domestic means as may seem expedient. This admission is made with the object of bringing to the knowledge of citizens, subjects, and officers of the state such facts and conditions as may enable them to act properly. In the parent state the method of conducting the hostilities may be a sufficient act of admission, and in a foreign state the enforcement of a neutrality law. The admission of insurgency by a foreign state is a domestic act, which can give no offense to the parent state, as might be the case in the recognition of belligerency. Insurgency is not a crime from the point of view of international law. A status of insurgency may entitle the insurgents to freedom of action in lines of hostile conflict which would not otherwise be accorded, as was seen in Brazil in 1893-94, and in Chili in 1891. It is a status of potential belligerency which a state, for the purpose of domestic order, is obliged to recognize. The admission of insurgency does not place the foreign state under new international obligations, as would the recognition of belligerency, though it may make the execution of its domestic laws more burdensome. It admits the fact of hostilities, without any intimation as to their extent, issue, righteousness, etc. The admission of the existence of this status of insurgency makes unnecessary much of the

earlier diplomatic circumlocution prevailing between the state divided by domestic strife and foreign states, and makes it possible for states to conduct negotiations with much less liability to misunderstandings. This is particularly evident in the diplomatic correspondence of late years. The tendency to depart from or to give special interpretations to the principles ordinarily governing the recognition of belligerency is much less, because, when a status of insurgency is admitted, many of the domestic reasons for such recognition may disappear, and the formal recognition need only take place when the international relations warrant such action. The admission of insurgency is the admission of an easily discovered material fact. The recognition of belligerency involves, not only a recognition of a fact, but also questions of policy touching many other considerations than those consequent upon the simple existence of hostilities.³⁴

LOSS OR MODIFICATION OF STATUS.

19. The loss or modification of the international status of a political unity may affect treaty relations, public obligations, public property, and private property and relations.

Grotius maintains that the political unity may be destroyed through the disappearance of the body politic, as by destruction of the people by flood or famine. The unity may disappear through the destruction of the bond of union which holds the people together, as in civil war. The international personality may disappear when one political unity is merged in or subordinated to another political unity, as when one state is conquered by another.³⁵ The destruction of the people of a state by pestilence, by flood, or other similar disaster, is now hardly conceivable. The dissolution of political bonds through revolt or otherwise has frequently occurred. The loss of inter-

³⁴ Wilson, *Insurgency*, Lectures U. S. Naval War College, 1900; *International Law Situations*, 1902, pp. 57-83; *Id.* 1904, pp. 26-62; *Insurgency and International Maritime Law*, 1 *American Jour. International Law*, p. 46.

³⁵ *De Jure Belli ac Pacis*, lib. II, cap. IX, 4-6.

national status by one unity through some form of merging in another political unity has been particularly common in international relations.

The modification of international status through the loss or giving up of a part of the independence possessed by a political unity may make it impossible for that unity to perform obligations which rested upon it previous to this modification of its status.

If the absolute destruction of the people of a state should occur, obligations resting upon them as a body politic would of necessity fall, though obligations resting on the territorial basis of the state might be sustained.

Similarly as a general principle it is maintained that, so far as treaty relations and public obligations are not in the main political, but territorial, they remain binding upon the local territory, even though the international person formerly having jurisdiction over the territory has lost status in the family of nations. The general principle is "*res transit cum suo onere*." This succession is generally restricted to those obligations which are of the nature of property rights³⁶ and to those which relate to the territory as public domain.³⁷

³⁶ English decision, *United States v. McRae*, 8 L. R. Eq. 72, quoted in *United States v. Smith*, 1 Hughes, 347, Fed. Cas. No. 16,335.

"I apprehend it to be clear, public, universal law that any government which de facto succeeds to any other government, whether by revolution or restoration, conquest or reconquest, succeeds to all the public property, to everything in the nature of public property, and to all rights in respect to the public property of the displaced power, whatever may be the nature or origin of the title of such displaced power. Any such public money in any treasury, any such public property found in any warehouse, fort, or arsenal, would, on the success of the new or restored power, vest ipso facto in such power, and it would have the right to call to account any fiscal or other agent or any debtor or accountant to or of the persons who had exercised and had ceased to exercise the authority of a government, the agent, debtor, or accountant having been the agent, debtor, or accountant of such persons in their character or pretended character of a government. But this is the right of succession, is the right

³⁷ *Claim of the Manila Railway Company*, Magoon, *Law of Civil Government under Military Occupation* (2d Ed.) p. 177, ff; 23 Ops. Attys. Gen. 181, 451; 1 Moore, §§ 96-98.

When the whole or a portion of one state becomes a part of another state as a result of conquest, cession, or otherwise, local obligations pass to the acquiring state. Contracts relating to the public interests of the acquired territory, entered into by the state formerly having sovereignty, are usually acknowledged by the new sovereign. Provisions to this effect occur in many treaties, and when not specifically mentioned such obligations are usually assumed, on proof that the claim is just and equitable.

Similarly, concessions relating to the acquired territory are usually continued.³⁸

of representation, is a right, not paramount, but derived, I will not say under, but through, the suppressed and displaced authority, and can only be enforced in the same way, and to the same extent, and subject to the same correlative obligations and rights, as if that authority had not been suppressed and displaced, and was itself seeking to enforce it." *Scott's Cases*, 89.

³⁸ "9. It is clear that a state which has annexed another is not legally bound by any contracts made by the state which has ceased to exist, and that no court of law has jurisdiction to enforce such contracts if the annexing state refuse to recognize them. But the modern usage of nations has tended in the direction of the acknowledgment of such contracts. After annexation, it has been said, the people change their allegiance; but their relations to each other and their rights of property remain undisturbed, and property includes those rights which lie in contract. '*La conquête change les droits politiques des habitants du territoire, et transfère au nouveau souverain la propriété du domaine public de son cedant. Il n'en est pas de même de la propriété privée qui demeure incommutable entre les mains de ses légitimes possesseurs.*' Concessions of the nature of those which were the subject of our inquiry presented examples of mixed public and private rights. They probably continue to exist after annexation until abrogated by the annexing state, and, as matter of practice in modern times, where treaties have been made on the cession of territory, have been often maintained by agreement. In considering what the attitude of a conqueror should be towards such concessions, we are unable to perceive any sound distinction between a case where a state acquires part of another by cession and a case where it acquires the whole by annexation. The opinion that in general private rights should be respected by the conqueror, though illustrated and supported by jurists by analogies drawn from the Roman law of inheritance, is based on the principle, which is one of ethics rather than of law, that the area of war and of suffering should be, so far as possible, narrowly con-

The protection of private rights is held to be obligatory upon the new sovereign as on the old. Sovereignty and political allegiance are transferred, but private rights and obligations are only so far modified as may be necessary for the exercise of jurisdiction by the state which has acquired the territory. "The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed."²⁹

fined, and that noncombatants should not, where it is avoidable, be disturbed in their business; and this principle is at least as applicable to a case where all as where some of the provinces of a state are annexed.

"10. Though we doubt whether the duties of an annexing state towards those claiming under concession or contracts granted or made by the annexed state have been defined with such precision in authoritative statement, or acted upon with such uniformity in civilized practice as to warrant their being termed rules of international law, we are convinced that the best modern opinion favors the view that, as a general rule, the obligations of the annexed state towards private persons should be respected. Manifestly the general rule must be subject to qualification; e. g., an insolvent state could not by aggression, which practically left to a solvent state no other course but to annex it, convert its worthless into valuable obligations. Again, an annexing state would be justified in refusing to recognize obligations incurred by the annexed state for the immediate purposes of war against itself; and probably no state would acknowledge private rights, the existence of which, caused, or contributed to cause, the war which resulted in annexation." Report of the Transvaal Concessions Commission, British State Papers, South Africa, 1901, Cd. 623, p. 7.

Maintaining the contrary to this last clause, Oppenheim says: "A state which has subjugated another would be obliged to take over even such obligations as have been incurred by the annexed state for the immediate purpose of the war which led to its subjugation." 1 International Law, 122.

²⁹ United States v. Percheman, 7 Pet. 51, 8 L. Ed. 604.

PART II

GENERAL RIGHTS AND OBLIGATIONS

CHAPTER II.

EXISTENCE, INDEPENDENCE AND EQUALITY.

20. Right of Existence.
21. Right of Self-Preservation.
22. Right of Independence.
23. Duty of Nonintervention.
24. Policy of Intervention.
25. Right of Equality.

RIGHT OF EXISTENCE.

- 20. In international law, the fundamental right of a state is the right of existence.**

The right of a state to exist as a member of the family of nations is based for those states, members of the original family of nations, upon historical grounds, and for other states upon international recognition or agreement. A *de facto* state, in the sense of public law, may exist prior to this acquisition of international status; but existence as a member of the international family is the fundamental right, from which the other rights recognized in international law are derived. The recognition of the right to exist would imply the possession of the power to exercise those rights generally exercised by the states constituting the family of nations. These rights have been variously classified, and with the rights corresponding duties and obligations have been grouped.¹

RIGHT OF SELF-PRESERVATION.

- 21. The right of self-preservation is an absolute right, based upon the right of existence, and is limited in its exercise by the rights of other states.**

A state may take measures necessary to maintain the conditions essential to its being, as in the protection of land and people and the development of national life and resources.

¹ Pradier-Fodéré, §§ 164-210.

Under the right of self-preservation states have taken action to increase the national dominion, population, and resources; to strengthen the means of defense and offense; to regulate commerce and other intercourse with foreign states; and, in general, to maintain the national security and well-being.

Of action necessary for national development or security the state is itself the judge, and for its action it must be responsible. The range of action is conditioned by the right of existence as possessed by other states, as in time of war the rights of the belligerents are conditioned by the rights of neutrals. Authorities do not agree as to what action may be taken under stress of necessity on the ground of self-preservation. As each state is the judge of what endangers its own existence and what measures may be necessary for its preservation, the action to be taken under given conditions is determined by policy, rather than by principles of law, and such action is usually tempered by the fear of war or other measures of redress.

RIGHT OF INDEPENDENCE.

22. The right of independence or freedom from external political control is derived from the nature of the state as sovereign.

The right of independence is implied in the recognition of existence of a state. Upon this right of independence of a state are based the exercise of internal political supremacy, the control over territory and population, and the regulation of relations with other states.² The exercise of internal political supremacy carries the right to adopt a constitution and to establish the government. Action in accord with the laws, made under the constitution, may give rise to international complications, as when citizens or property of one state are

² "Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves." *Underhill v. Hernandez*, 168 U. S. 250, 18 Sup. Ct. 83, 42 L. Ed. 456.

within another. Many of these questions belong to the field of conflict of laws, rather than to public international law. The exercise of the right of independence in making laws in regard to commercial relations was one of the earliest matters giving rise to conflicts which made international agreements desirable and necessary. The field of uniformity in the domestic laws upon matters of common interest has rapidly broadened. Very many of the important questions upon which uniformity in legislation in different states is desirable have been discussed by official international conferences. Such conferences averaged more than two for each year during the last quarter of the nineteenth century, and have been even more frequent during the twentieth century. The results of the conferences have tended to enlarge the range of possible independent action, while removing to a considerable degree the probability of arbitrary action on the part of the states participating in the conferences. Thus there has been an attempt to secure the advantages of internal sovereignty without the possible disagreements and friction naturally consequent upon the closer relation between different states and the citizens of different states.

The principle of independence is in no wise denied in the voluntary engagements to which states may become parties. Treaties and conventions are made with a view to benefit all who ratify them, and such agreements do not create a power superior to the contracting parties.

DUTY OF NONINTERVENTION.

- 23. Correlative with the right of independence is the duty of nonintervention by one state in affairs which solely concern another state or other states.**

While a state is under obligation not to intervene in the affairs of other states, yet intervention is sometimes regarded as justifiable on the ground of the fundamental right of self-preservation of the state, for the maintenance of conditions necessary for the existence of international relations,³ for the

³ Intervention took place in China in 1900 in consequence of the Boxer uprising, which shut up in Peking diplomatic representatives

fulfilment of a treaty of guarantee, on invitation of a party to a civil war, under sanction of a body of states, as a matter of national policy, or upon grounds clearly outside the field of international law.

In theory, intervention for self-preservation would involve the intervening state in no more serious consequences than would follow nonintervention. The existence of the state is threatened in either case. The determination of a line of action, therefore, becomes a question of policy. The action will

and other foreigners. The several powers sent armed forces to their rescue. The United States defined its purposes and policy in the following circular note to the co-operating powers:

“Department of State, Washington, July 3, 1900.

“In this critical posture of affairs in China, it is deemed appropriate to define the attitude of the United States as far as present circumstances permit this to be done. We adhere to the policy initiated by us in 1857 of peace with the Chinese nation, of furtherance of lawful commerce, and of protection of lives and property of our citizens by all means guaranteed under extraterritorial treaty rights and by the law of nations. If wrong be done to our citizens, we propose to hold the responsible authors to the uttermost accountability. We regard the condition at Pekin as one of virtual anarchy, whereby power and responsibility are practically devolved upon the local provincial authorities. So long as they are not in overt collusion with rebellion, and use their power to protect foreign life and property, we regard them as representing the Chinese people, with whom we seek to remain in peace and friendship. The purpose of the President is, as it has been heretofore, to act concurrently with the other powers, first, in opening up communication with Pekin and rescuing the American officials, missionaries, and other Americans who are in danger; secondly, in affording all possible protection everywhere in China to American life and property; thirdly, in guarding and protecting all legitimate American interests; and, fourthly, in aiding to prevent a spread of the disorders to the other provinces of the Empire and a recurrence of such disasters. It is, of course, too early to forecast the means of attaining this last result; but the policy of the government of the United States is to seek a solution which may bring about permanent safety and peace to China, preserve Chinese territorial and administrative entity, protect all rights guaranteed to friendly powers by treaty and international law, and safeguard for the world the principle of equal and impartial trade with all parts of the Chinese Empire.

“You will communicate the purport of this instruction to the minister for foreign affairs. Hay.”

Foreign Relations U. S., 1901, Appendix, p. 12.

naturally vary according to the strength of the state and according to the degree to which the well-being of the state is endangered. It may be by force of arms, by diplomatic negotiation, or by other means.

"Intervention takes place when a state interferes in the relations of two other states without the consent of both or either of them, or when it interferes in the domestic affairs of another state, irrespectively of the will of the latter, for the purpose of either maintaining or altering the actual condition of things within it. *Primâ facie* intervention is a hostile act, because it constitutes an attack upon the independence of the state subjected to it. Nevertheless its position in law is somewhat equivocal. Regarded from the point of view of the state intruded upon, it must always remain an act which, if not consented to, is an act of war. But, from the point of view of the intervening power, it is not a means of obtaining redress for a wrong done, but a measure of prevention or of police, undertaken sometimes for the express purpose of avoiding war. * * * The right of independence is so fundamental a part of international law, and respect for it is so essential to the existence of legal restraint, that any action tending to place it in a subordinate position must be looked upon with disfavor, and any general grounds of intervention pretending to be sufficient, no less than their application in particular cases, may properly be judged with an adverse bias."⁴

Intervention has often been justified on the ground that citizens of one state have been denied ordinary justice while in another state. While it may be admitted in principle that states must respect ordinary justice in their international dealings, in practice it has been found difficult to reconcile the ideas of justice as held in different states. Unreasonable delays in trial, discrimination against the foreigner on trial, or refusal of rights usually granted to accused in civilized states, have been held as grounds justifying intervention,⁵ and upon

⁴ Hall, *Int. Law* (5th Ed.) pp. 284, 285.

⁵ Secretary Bayard maintained, in a communication to the United States minister to Mexico in 1886, that:

"By the law of nations no punishment can be inflicted by a sover-

such grounds diplomatic and other intervention has taken place. Demands have also often been made by a citizen that his state interfere in aiding him in collecting a debt due from a foreign state. At the Hague Conference of 1907 an agreement was reached that states would not engage in hostilities for this reason. This is a modification of the "Drago Doctrine." It has not been the practice of the United States to interfere in such cases other than by use of its good offices.⁶ Other states have exercised a wide discretion in such cases, employing at times various degrees of constraint, even resorting to war.⁷

sign on citizens of other countries, unless in conformity with those sanctions of justice which all civilized nations hold in common.

"Among these sanctions are the right of having the facts on which the charge of guilt was made examined by an impartial court, the explanation to the accused of these facts, the opportunity granted to him of counsel, such delay as is necessary to prepare his case, permission in all cases not capital to go at large on bail till trial, the due production under oath of all evidence prejudicing the accused, giving him the right to cross-examination, the right to produce his own evidence in exculpation, release even from temporary imprisonment in all cases where the charge is simply one of threatened breach of the peace, and where due security to keep the peace is tendered." Foreign Relations U. S., 1886, p. 701.

⁶ For review of cases involving United States citizens, see 6 Moore, Int. Law Dig. § 912 et seq.

⁷ A letter bearing date of December 29, 1902, from Señor Luis M. Drago, Argentine Minister of Foreign Relations, was transmitted to the State Department of the United States, contains what has been called the "Calvo Doctrine," or the "Drago Doctrine," in regard to the collection of public debts: "The only principle which the Argentine Republic maintains, and which it would, with great satisfaction, see adopted, in view of the events in Venezuela, by a nation that enjoys such great authority and prestige as does the United States, is the principle, already accepted, that there can be no territorial expansion in America on the part of Europe, nor any oppression of the peoples of this continent, because an unfortunate financial situation may compel some one of them to postpone the fulfillment of its promises. In a word, the principle which she would like to see recognized is that the public debt cannot occasion armed intervention, nor even the actual occupation of the territory of American nations, by a European power." Foreign Relations U. S., 1903, p. 4.

A modified form of this "Drago Doctrine" was approved by the Second Hague Conference in 1907 by thirty-nine votes, with five

The question as to intervention under treaty of guaranty has been much disputed. Treaties containing guaranties vary in character, and some could doubtless be supported, while the attempt to carry out others would involve unjustifiable intervention. Such treaties must usually receive interpretation according to the principle "*rebus sic stantibus*," and the observance of their provisions frequently becomes merely a question of policy, and may need other justification than the written agreement. Intervention under a treaty of guaranty which provides for the maintenance of a certain form of government or ruling family is regarded by some as unjustifiable⁸ and by others as justifiable.⁹ Provisions of guaranty may limit the

abstentions. Twelve Latin-American states made reservations. Article I of the Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts contains the regulation:

"The contracting powers agree not to have recourse to armed force for the recovery of contract debts claimed from the government of one country by the government of another country as being due to its nationals.

"This undertaking is, however, not applicable when the debtor state refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any compromise from being agreed on, or, after the arbitration, fails to submit to the award."

Some reservations were entered because the use of force was prohibited only till efforts at arbitration were refused or failed.

Cobro Coercitivo de Deudas Públicas, Drago, 1906.

On December 7, 1902. Germany and Great Britain issued notes identical in form in regard to the contractual claims of citizens of the respective states against the Venezuelan government. This note declares that, "if the demands of the two governments are not satisfied, joint military action will immediately be undertaken." Foreign Relations U. S., 1903, p. 419. It was proposed that coercion should take the form of blockade, without a declaration of war. The United States did "not acquiesce in any extension of the doctrine of pacific blockade," and a regular blockade was declared on December 20, 1902, in which Italy also joined. Foreign Relations U. S., 1903, p. 417 et seq. After the blockade was raised the questions in regard to claims were referred to arbitration. See Ralston's Report, Venezuelan Arbitration of 1903; Report of William L. Penfield, The Venezuelan Arbitration before the Hague Tribunal, 1903.

⁸ As by Twiss, Halleck, and Hall.

⁹ As by De Martens, Heffter, and Oppenheim.

exercise of full sovereignty,¹⁰ or may make secure the existence of a state having a qualified status, as in the case of certain neutralized states.

Intervention on invitation of a party to a civil war is not now regarded as justifiable. Of course, civil war may give rise to conditions which may lead a state to intervene on other grounds, as in case of the intervention of the United States in Cuba in 1898.¹¹ It was regarded by some writers as justifiable

¹⁰ The Republic of New Granada (Colombia) and the United States, by the treaty of December 12, 1846, article 35, make mutual guarantees, and the United States prior to 1903 frequently intervened under its provisions by landing armed forces on the Isthmus of Panama. "The government of New Granada guarantees to the government of the United States, that the right of way or transit across the Isthmus of Panama upon any modes of communication that now exist, or that may be hereafter constructed, shall be open and free to the government and citizens of the United States, and for the transportation of any articles of produce, manufactures, or merchandise, of lawful commerce, belonging to the citizens of the United States; that no other tolls or charges shall be levied or collected upon the citizens of the United States, or their said merchandise, thus passing over any road or canal that may be made by the government of New Granada, or by the authority of the same, than is under like circumstances levied upon and collected from the Granadian citizens; that any lawful produce, manufactures, or merchandise belonging to citizens of the United States, thus passing from one sea to the other, in either direction, for the purpose of exportation to any other foreign country, shall not be liable to any import duties whatever, or, having paid such duties, they shall be entitled to drawback, upon their exportation; nor shall the citizens of the United States be liable to any duties, tolls, or charges of any kind to which native citizens are not subjected for thus passing the said Isthmus. And, in order to secure to themselves the tranquil and constant enjoyment of these advantages, and as an especial compensation for the said advantages and for the favors they have acquired by the fourth, fifth and sixth articles of this treaty, the United States guarantee positively and efficaciously to New Granada, by the present stipulation, the perfect neutrality of the before-mentioned Isthmus, with the view that the free transit from the one to the other sea may not be interrupted or embarrassed in any future time while this treaty exists; and, in consequence, the United States also guarantee, in the same manner, the rights of sovereignty and property which New Granada has and possesses over the said territory."

¹¹ The President of the United States gives "the interests of hu-

to intervene on invitation of the parent state, if not on invitation of the rebelling party. Even such intervention would imply a doubt as to the ability of the party in power to maintain itself as the *de facto* government, and international law does not sanction the assumption by a foreign state of the right to judge as to the merits of a conflict in another state. Intervention in behalf of the rebelling party would violate the independence of the established state.

Intervention under sanction of a body of states, or through joint or concerted action, has been common. It is reasonable to conclude that such intervention would be less liable to be on narrow or selfish grounds, because based on the approval of several states. Such intervention was common in Europe for the preservation of the so-called balance of power. This has been the argument for the many interventions in the affairs of Southeastern Europe. Intervention by a body of states is usually professedly for the highest well-being of all parties concerned, particularly of the state subject to the action. The final results often give evidence that each state expects its own policy will in some way be advanced, frequently at the expense of the state subject to the intervention.¹²

Intervention on grounds outside the field of international

manity" as one of the grounds justifying intervention in Cuba in 1898: "The grounds justifying that step were the interests of humanity, the duty to protect the life and property of our citizens in Cuba, the right to check injury to our commerce and people through the devastation of the island, and, most important, the need of removing at once and forever the constant menace and the burdens entailed upon our government by the uncertainties and perils of the situation caused by the unendurable disturbance in Cuba." Message of President McKinley, December 5, 1898.

¹² At the close of the Chino-Japanese war in 1895, Japan obtained the concession of the Liao-tung peninsula, with Port Arthur. Eight days after the treaty of cession was signed, Russia, supported by France and Germany, presented the following note to Japan:

"The Imperial Russian Government, having examined the terms of peace demanded of China by Japan, consider the contemplated possession of the Liao-tung peninsula by Japan will not only constitute a constant menace to the capital of China, but will also render the independence of Korea illusory, and thus jeopardize the permanent peace of the Far East. Accordingly, the Imperial Government, in a spirit of cordial friendship for Japan, hereby counsel the govern-

law must look outside of international law for sanction; e. g., intervention on grounds of humanity or religion.

Intervention on the grounds of humanity has looked to the general principles of human association for its justification. It is maintained that, as a single state can resort to intervention to preserve itself, so society can take action against any state within it for the preservation of itself or for its well-being. While such intervention might be viewed favorably, if sanctioned by society in general outside the offending state, intervention on this ground may be open to grave abuse, if taken by a single state without general sanction. The claim that intervention on the ground of preserving the public health, or preventing the spread of dangerous diseases, and the like, is intervention on the ground of humanity, seems to be an unnecessary inference, as such intervention would be justified on the ground of self-preservation.¹³

The protection of religion has been named as the reason justifying many interventions. This has been particularly true in affairs in Southeastern Europe. Treaties sometimes provide for diplomatic action, or even intervention by force, for the protection of religion.¹⁴

ment of the Emperor of Japan to renounce the definitive possession of the Liao-tung peninsula."

Japan, not desiring to take the risk of defying the three powers, issued a rescript in which she "yielded to the dictates of magnanimity, and accepted the advice of the three powers."

On April 5, 1898, a proclamation was issued, stating that Russia had acquired a lease of Liao-tung region. *Foreign Relations U. S.*, 1898, p. 183.

¹³ Pradier-Fodéré, § 435.

¹⁴ Treaty of Berlin of 1878 provides that:

"The right of official protection by the diplomatic and consular agents of the powers in Turkey is recognized, both as regards the above-mentioned persons and their religious, charitable, and other establishments in the holy places and elsewhere." 4 *Hertslet*, p. 2797.

In 1891, Mr. Blaine, Secretary of State, sent a communication to the United States minister at St. Petersburg in regard to the treatment of Jews in Russia, closing with the statement of the position of the United States:

"The government of the United States does not assume to dictate the internal policy of other nations, or to make suggestions as to

In general, it may be said that in actual practice intervention becomes a matter of policy. Nonintervention is the duty resting upon states as regards one another's affairs. Each state must judge for itself of the propriety of intervention, or of an agreement to intervene under given conditions, and must then abide the consequences. In practice it has never been difficult to find an ostensible reason for intervention in the affairs of a foreign state, when the wish was present.

Formerly the tender of good offices or of mediation by a third state, in case of disagreement between two states, was sometimes regarded as intervention, and as an unfriendly act; but the Hague Convention for the Pacific Settlement of International Disputes, 1907, provides that "the exercise of this right can never be regarded by the one or the other of the parties in dispute as an unfriendly act."¹⁵ Thus, for the states parties to the convention, constituting practically all civilized nations, the tender of good offices and mediation becomes a right.

Intervention as a policy has been avowed by a group of states as in the "balance of power" doctrine, and by a single state as in the "Monroe Doctrine."

what their municipal laws should be, or as to the manner in which they should be administered. Nevertheless, the mutual duties of nations require that each should use its power with a due regard for the results which its exercise produces on the rest of the world. It is in this respect that the condition of the Jews in Russia is now brought to the attention of the United States, upon whose shores are cast daily evidences of the suffering and destitution wrought by the enforcement of the edicts against this unhappy people. I am persuaded that His Imperial Majesty the Emperor of Russia and his councilors can feel no sympathy with measures which are forced upon other nations by such deplorable consequences.

"You will read this instruction to the minister of foreign affairs, and give him a copy if he desires it."

Foreign Relations U. S., 1891, p. 739.

¹⁵ Title II, art. 3, Appendix, p. 520.

POLICY OF INTERVENTION.

24. Two well-established policies have been based upon intervention, viz., the balance of power in Europe, and the Monroe Doctrine in America.

- (a) The maintenance of the balance of power implied that the members of the European family of nations would view as a cause for intervention the concentration of such power in any one of its members as to enable that state to coerce the others.**
- (b) The Monroe Doctrine implied that the United States would view as a just ground for intervention any attempt to extend European dominance on the American continent.**

The principle underlying the doctrine of the balance of power seems to be that the increase in the power of one state or the change in relations of states may endanger the existence of others; hence it is necessary that states in such geographical proximity as to be endangered must take measures for their preservation. There is no claim that the increase in power or change in relations may involve wrong dealing or injustice, but rather that, owing to the neighborhood of the states, their security as political unities is involved. This may be interpreted so as to justify the refusal of the fruits of conquest or diplomatic negotiations to a state, or so as to uphold the government of a weak state, lest a strong state may absorb it, and thus disturb the equilibrium.

(a) Some ideas of the European balance of power among states appear very early.¹⁶ The Treaty of Westphalia, 1648, embodies its principles. The Treaty of Utrecht between Great Britain and Spain, in 1713, gives as its object the establish-

¹⁶ Hill, speaking of the end of the fifteenth century, says:

"Too distrustful of one another's designs to unite in permanent confederations, the Italians had learned to preserve their local independence by a system of diplomatic equilibrium. In the conflict for pre-eminence which was soon to fill the broader arena of Europe, the experience of Italy was to furnish the method by which the nations were to maintain their local sovereignty against imperial aspirations so colossal in their proportions as to render the pretensions of the past comparatively insignificant." II History of European Diplomacy, p. 164.

ment of peace and tranquility in Christendom through a just equilibrium of power. This object was frequently reaffirmed in treaties during the eighteenth century. The memory of acquisition of great power in the hands of a single ruler at the time of Napoleon caused all European states to view with suspicion the increase of power in the hands of any ruler. To protect, to maintain, or to re-establish the balance of power or the European equilibrium was a common nominal object for which conferences were called and agreements made during the nineteenth century. The European states have particularly concerned themselves with the status of Southeastern Europe. Each power feared any movement which would change the conditions in these domains. An Asiatic rule at one of the most important strategic positions in Europe has been maintained through fear of the results if Constantinople should fall into the hands of a European power. Conferences, in which representatives of the peoples directly concerned have not been present, have settled the boundaries, political relations, etc., of countries of Southeastern Europe.

(b) Referring to the claims of Russia on the northwest coast of the American continent, President Monroe, in his message of December 2, 1823, said: "The occasion has been judged proper for asserting as a principle in which the rights and interests of the United States are involved that the American continents, by the free and independent condition which they have assumed and maintain, are henceforth not to be considered as subjects for future colonization by any European powers." As to the attitude of the allied powers toward the states to the south of the United States he says: "We owe it, therefore, to candor, and to the amicable relations existing between the United States and those powers, to declare that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety. With the existing colonies or dependencies of any European power we have not interfered, and shall not interfere. But with the governments who have declared their independence, and maintained it, and whose independence we have, on great consideration and on just principles, acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their

destiny, by any European power, in any other light than as the manifestation of an unfriendly disposition toward the United States."

Thus there was announced the doctrine that (1) the American continents "are henceforth not to be considered as subjects for future colonization by any European powers"; (2) the United States would "consider any attempt on their part to extend their system to this hemisphere as dangerous to our peace and safety"; and (3) as to existing governments on the American continent the United States would "not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, by any European power, in any other light than as the manifestation of an unfriendly disposition toward the United States." This statement of policy received the name of the "Monroe Doctrine."¹⁷

It is accepted that, while the doctrine is generally called by the name of the President, it was in a sense not his work, but was distinctly "the work of John Quincy Adams."¹⁸

While the doctrine has never received formal sanction by Congress, Congress has many times taken action in accord with its principles, Secretaries of State have reaffirmed it, Presidents have interpreted it to meet the needs of the period, and, though no action was taken by the Hague Conferences, it was formally mentioned in the reservation under which the United States became a party to The Hague Conventions for the Pacific Settlement of International Disputes of 1899 and 1907.¹⁹

¹⁷ President Monroe's Message, December 2, 1823. •

¹⁸ John Quincy Adams and the Monroe Doctrine, Worthington C. Ford, 7 *Amer. Historical Rev.* 1902, 676, and 8 *Id.* 28; Reddaway, *The Monroe Doctrine*, 87; Hart, *Foundations of American Foreign Policy*, 214; Tucker, *The Monroe Doctrine*, 12.

¹⁹ "Nothing contained in this convention shall be so construed as to require the United States of America to depart from its traditional policy of not intruding upon, interfering with, or entangling itself in the political questions of policy or internal administration of any foreign state; nor shall anything contained in the said convention be construed to imply a relinquishment by the United States of America of its traditional attitude toward purely American questions."

While the United States participated in the International Confer-

In commenting on this action, President Roosevelt gives a broad interpretation to the earlier doctrine in his message of December 3, 1901:

"This same peace conference acquiesced in our statement of the Monroe Doctrine as compatible with the purposes and aims of the conference.

"The Monroe Doctrine should be the cardinal feature of the foreign policy of all the nations of the two Americas, as it is of the United States. Just seventy-eight years have passed since President Monroe in his annual message announced that 'the American continents are henceforth not to be considered as subjects for future colonization by any European power.' In other words, the Monroe Doctrine is a declaration that there must be no territorial aggrandizement by

ence of Algeiras and with the European powers signed the General Act of April 17, 1906, it was done under reservation that this action was for the general protection of United States interests in Morocco and was without "assuming obligation or responsibility for the enforcement thereof." The United States Senate appended a further explanation of the conditions of ratification to the effect that it was "without purpose to depart from the traditional American foreign policy, which forbids participation by the United States in the settlement of political questions which are entirely European in their scope." 1 Amer. Jour. Int. Law, Official Documents, p. 47.

In a pro memoria of December 11, 1901, the German ambassador to the United States distinctly announced the intention of Germany to observe the Monroe Doctrine while pressing the claims against Venezuela:

"The Imperial Government proposes therefore to submit the reclamations in question, which have been carefully studied and have been considered as well founded, directly to the Venezuelan Government, and to ask for their settlement. If the Venezuelan Government continues to decline as before, it would have to be considered what measures of coercion should be used against it.

"But we consider it of importance to let first of all the Government of the United States know about our purposes, so that we can prove that we have nothing else in view than to help those of our citizens who have suffered damages, and we shall first take into consideration only the claims of those German citizens who have suffered in the civil war.

"We declare especially that under no circumstances do we consider in our proceedings the acquisition or the permanent occupation of Venezuelan territory."

Foreign Relations U. S., 1901, p. 194.

any non-American power at the expense of any American power on American soil. It is in no wise intended as hostile to any nation in the Old World. Still less is it intended to give cover to any aggression by one New World power at the expense of any other. It is simply a step, and a long step, toward assuring the universal peace of the world by securing the possibility of permanent peace on this hemisphere.

"During the past century other influences have established the permanence and independence of the smaller states of Europe. Through the Monroe Doctrine we hope to be able to safeguard like independence and secure like permanence for the lesser among the New World nations.

"This doctrine has nothing to do with the commercial relations of any American power, save that it in truth allows each of them to form such as it desires. In other words, it is really a guaranty of the commercial independence of the Americas. We do not ask under this doctrine for any exclusive commercial dealings with any other American state. We do not guarantee any state against punishment if it misconducts itself, provided that punishment does not take the form of the acquisition of territory by any non-American power."²⁰

In the message of December 6, 1904, President Roosevelt says:

"Chronic wrongdoing, or an impotence which results in a general loosening of the ties of civilized society, may in America, as elsewhere, ultimately require intervention by some civilized nation, and in the Western Hemisphere the adherence of the United States to the Monroe Doctrine may force the United States, however reluctantly, in flagrant cases of such wrongdoing or impotence, to the exercise of an international police power."²¹

In the actual strain of diplomatic relations consequent upon the controversy over the boundary between Venezuela and British Guiana, the United States formally declared in 1895 the intention to support the Monroe Doctrine. President Cleveland said:

"If the balance of power is justly a cause for jealous anxiety among the governments of the Old World, and a subject for

²⁰ Foreign Relations U. S., 1901, p. xxxvi.

²¹ Foreign Relations U. S., 1904, p. xli.

our absolute noninterference, none the less is an observance of the Monroe Doctrine of vital concern to our people and their government.

"Assuming, therefore, that we may properly insist upon this doctrine, without regard to 'the state of things in which we live,' or any changed conditions here or elsewhere, it is not apparent why its application may not be invoked in the present controversy.

"If a European power, by an extension of its boundaries, takes possession of the territory of one of our neighboring Republics, against its will and in derogation of its rights, it is difficult to see why to that extent such European power does not thereby attempt to extend its system of government to that portion of this continent which is thus taken. This is the precise action which President Monroe declared to be 'dangerous to our peace and safety,' and it can make no difference whether the European system is extended by an advance of frontier or otherwise."²²

The principles set forth in the Monroe Doctrine have been variously interpreted.²³ Foster, reviewing American diplomacy from 1776 to 1876, says:

"From the foregoing historical review I think it may be fairly deduced that the principle or policy of the government of the United States, known as the Monroe Doctrine, declares affirmatively:

"First. That no European power, or combination of powers, can intervene in the affairs of this hemisphere for the purpose, or with the effect, of forcibly changing the form of government of the nations, or controlling the free will of their people.

"Second. That no such power or powers can permanently acquire or hold any new territory or dominion on this hemisphere.

"Third. That the colonies or territories now held by them cannot be enlarged by encroachment on neighboring territory, nor be transferred to any other European power; and, while the United States does not propose to interfere with existing

²² Foreign Relations U. S., pt. 1, 1895, p. 542.

²³ 6 Moore, §§ 927-969.

colonies, 'it looks hopefully to the time when * * * America shall be wholly American.'

"Fourth. That any interoceanic canal across the isthmus of Central America must be free from the control of European powers.

"While each of the foregoing declarations has been officially recognized as a proper application of the Monroe Doctrine, the government of the United States reserves to decide, as each case arises, the time and manner of its interposition, and the extent and character of the same, whether moral or material, or both.

"The Monroe Doctrine, as negatively declared, may be stated as follows:

"First. That the United States does not contemplate a permanent alliance with any other American power to enforce the doctrine, as it determines its action solely by its view of its own peace and safety; but it welcomes the concurrence and co-operation of the other in its enforcement, in the way that to the latter may seem best.

"Second. That the United States does not insist upon the exclusive sway of republican government; but, while favoring that system, it recognizes the right of the people of every country on this hemisphere to determine for themselves their form of government.

"Third. That the United States does not deny the right of European governments to enforce their just demands against American nations, within the limits above indicated.

"Fourth. That the United States does not contemplate a protectorate over any other American nation, seek to control the latter's conduct in relation to other nations, nor become responsible for its acts."²⁴

In 1902, in a note, Mr. Drago, the Minister of Foreign Relations of the Argentine Republic, referring to the collection of loans by military means, said that this practice upon the part of the European states as regards South American states implied territorial occupation of South American states. He stated that: "Such a situation seems obviously at variance with the principles many times proclaimed by the nations of

²⁴ Foster, *A Century of American Diplomacy, 1776-1876*, p. 475.

America, and particularly with the Monroe Doctrine, sustained and defended with so much zeal on all occasions by the United States, a doctrine to which the Argentine Republic has heretofore solemnly adhered. * * * In a word, the principle which she [the Argentine Republic] would like to see recognized is: That the public debt cannot occasion armed intervention, nor even the actual occupation of the territory of American nations, by a European power.”²⁵ This principle is known as the “Drago Doctrine.” The United States announced that, without expressing assent to or dissent from the propositions, the general position of the government had been expressed in the President’s message of December 3, 1901: “We do not guarantee any state against punishment if it misconducts itself, provided that punishment does not take the form of the acquisition of territory by any non-American power.”

This principle, brought before the Hague Conference of 1907 by the American plenipotentiary, General Porter, after discussion, took form in a Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts:

“Art. I. The contracting powers agree not to have recourse to armed force for the recovery of contract debts claimed from the government of one country by the government of another country as being due to its nationals.”

The United States did not in this convention, as in the case of the Convention for the Pacific Settlement of International Disputes, enter the reservation embodying the Monroe Doctrine.

RIGHT OF EQUALITY.

25. Each state of the family of nations is regarded as having similar privileges, immunities, and duties, as regards international law, though inequalities may exist in the amount of power which each may exercise in interstate relations.

The breaking up of the political unity of Christendom in the sixteenth century brought new theories of the state. Bodin’s

²⁵ Foreign Relations U. S., 1903, p. 3.

theory of sovereignty as absolute, indivisible, and inalienable made comparatively simple the development of the doctrine of the equality of states under the influence of the concepts of natural law current at that period. Grotius (1583-1645), strongly influenced by the theory of natural law, emphasizes the necessity for the recognition of equality in the domain of law.²⁶ The equality was not of power, territory, population, influence, or honor, but equality in the sense of having the same attributes as states. On the ground of equality, regardless of extent of territory or number of population, each state of the family of nations has a similar status at international law.

The doctrine of equality has been denied by many writers upon international law, and certainly in wealth, in age, and in many other respects states are not equal. However, whether wisely or unwisely, in the two recent international conferences at The Hague in 1899 and in 1907, the equality of states taking part in the conferences was fully recognized in voting upon the matters under consideration.

In actual practice, inequalities exist in the amount of influence exercised by different states. Austria-Hungary, France, Germany, Great Britain, Italy, and Russia are recognized as the Great Powers in Europe. Certain others are recognized as the Minor Powers. In recent years, those states which have possessions of such wide extent as to involve them in relations with many other states have come to be called "World Powers." Not all the Great Powers of Europe are included among the World Powers, and other than European states have equal claim to be regarded as Great Powers.

Other inequalities are manifest in matters of ceremonial and precedence. Such marks of inequality frequently have their bases in conditions which have ceased to exist, as when kingdoms claimed precedence over republics, because kingdoms were regarded as entitled to royal honors, or when kings and emperors claimed the sole right to send diplomats of the rank of ambassadors.

Each state now claims equal right to determine the form of its internal government, whether monarchical or republican, the

²⁶ Grotius, *De Jure Belli ac Pacis*, Prolegomena xxiii.

privileges due to its personality, and immunity from any action on the part of other states which would be in derogation of its sovereignty.

In 1825 Chief Justice Marshall maintained that: "No principle of general law is more universally acknowledged than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone. A right, then, which is vested in all by the consent of all, can be divested only by consent. * * * As no nation can prescribe a rule for others, none can make a law of nations."²⁷

²⁷ *The Antelope*, 10 Wheat. 66, 6 L. Ed. 268.

CHAPTER III.

PROPERTY AND DOMAIN.

- 26. Property.
- 27. Domain.
- 28. Acquisition of Territorial Domain.
- 29. Maritime and Fluvial Domain.
- 30. Aërial Domain.

PROPERTY.

- 26. A state, as a public person, may hold property in the sense of absolute ownership, and the treatment of such property, both in peace and in war, may be determined by the status of the owner, rather than by the locus and nature of the thing itself.**

In time of peace, public property, as vessels belonging to one state within the ports of another state, or the official residences of diplomats, receive special exemptions.¹ In the time of war, public property of one belligerent state is liable to special severity of treatment by the other belligerent. Cash, funds, and property liable to requisition, and belonging strictly to the state, is liable to be taken, while similar property belonging to private persons, if appropriated, must be made good at the conclusion of peace.² Neutral public property also receives special

¹ *Vavas seur v. Krupp*, L. R. 9 Ch. Div. 351, Scott's Cases. 182 seq. "As a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each and every one declines to exercise, by means of any of its courts, any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction." *The Parlement Belge*, L. R. 5 P. Div. 197.

² *Hague Convention, Laws and Customs of War on Land*, art. 53, Appendix, p. 544.

exemption in time of war. A neutral public vessel is exempt from visit and search, to which a neutral private vessel is liable. On the other hand, in time of war the neutral state cannot give the same privileges to certain public vessels of the belligerents as in time of peace, e. g., in permitting equipment in the neutral port; while private vessels in time of war are generally allowed the same privileges as in time of peace.

The public property appertaining to a given territory passes from one state to another on the transfer of sovereignty, but the status of private property would remain unchanged so far as it was not repugnant to the laws of the new sovereign.³

3 "By the cession public property passes from one government to the other. but private property remains as before, and with it those municipal laws which are designed to secure its peaceful use and enjoyment. As a matter of course, all laws, ordinances, and regulations in conflict with the political character, institutions, and constitution of the new government are at once displaced. Thus, upon a cession of political jurisdiction and legislative power—and the latter is involved in the former—to the United States, the laws of the country in support of an established religion, or abridging the freedom of the press, or authorizing cruel and unusual punishments, and the like, would at once cease to be of obligatory force without any declaration to that effect; and the laws of the country on other subjects would necessarily be superseded by existing laws of the new government upon the same matters. But with respect to other laws affecting possession, use, and transfer of property, and designed to secure good order and peace in the community, and promote its health and prosperity, which are strictly of a municipal character, the rule is general that a change of government leaves them in force until, by direct action of the new government, they are altered or repealed." *Chicago, R. I. & P. Ry. Co. v. McGlinn*, 114 U. S. 542, 5 Sup. Ct. 1005, 29 L. Ed. 270.

"No proceedings affecting the rights of the new sovereign over public property can be taken, except in pursuance of his authority on the subject." *More v. Steinbach*, 127 U. S. 70, 8 Sup. Ct. 1067, 32 L. Ed. 51.

The nature of the transfer is indicated in the Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, 1898: "Whereas, the government of the Republic of Hawaii having in due form signified its consent, in the manner provided by its Constitution, to cede, absolutely and without reserve, to the United States of America, all rights of sovereignty of whatsoever kind in and over the Hawaiian Islands and their dependencies, and also to cede and transfer to the United States the absolute fee and owner-

Under the right of eminent domain, a state, in accordance with the laws, has the right to resume, when public interest requires it, possession of any property within the state.

DOMAIN.

27. The term "domain," or sometimes "territory," is used to cover the sphere within which a state may exercise its sovereignty.

The word "territory," from its derivation and history, naturally emphasizes the idea of sovereignty over land, which is an essential condition of state existence. The word "domain" refers rather to the entire range of exercise of dominion. It is accordingly becoming more common to use the word "territory" in the stricter sense as applying to the land of a state, over which the sovereignty is more absolute than over the water or atmosphere. While the term "maritime territory" is sometimes used, it seems to involve a contradiction, as would "aërial territory."

Domain may accordingly be

- (a) Territorial,
- (b) Maritime or fluvial, or
- (c) Aërial.

(a) As against all other states, a state has exclusive title to all its land and its appurtenances, and a paramount title as regards its own subjects, as is shown in the right of eminent domain. The territorial domain is coterminous with the land belonging to the state or under its sovereignty for the time being.

(b) In general, the sovereignty over maritime and fluvial domain is limited, and rights of the state to the neighboring sea and certain other waters are not exclusive. Wheaton says: "Things of which the use is inexhaustible, such as the sea and running water, cannot be so appropriated as to exclude others

ship of all public government, or crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining." 30 Stat. 750.

from using these elements in any manner which does not occasion a loss or inconvenience to the proprietor."⁴

(c) The principle enunciated by Wheaton above applies in a general way to aërial domain.

ACQUISITION OF TERRITORIAL DOMAIN.

28. The title to territorial domain is now usually based on occupation, prescription, accretion, conquest, or cession.

The methods of acquisition of title to territorial domain have been variously classified. Some writers recognize only two or three methods, from which others are derived; others enumerate a large number.⁵ The methods most commonly accepted at present are (a) occupation; (b) prescription; (c) accretion; (d) conquest; (e) cession.

(a) Occupation is the basis of the title to the original territorial domain of many states. An inchoate title is obtained by discovery of land hitherto unknown to civilized states; but, in order that this title may be good against other states, it must be followed by occupation,⁶ or by some other act which may be

⁴ Wheaton, *International Law*, § 193.

⁵ Ullman, *Volkerrecht*, § 81, derives all forms from cession and occupation.

⁶ "On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

"The exclusion of all other Europeans necessarily gave to the

similarly construed. General Act, chapter VI, article 34, of the Berlin Conference, 1885, makes special provision in regard to the acquisition of land on the coasts of the African continent, requiring that:

"Any power which henceforth takes possession of a tract of land on the coasts of the African continent outside of its present possessions, or which, being hitherto without such possessions, shall acquire them, as well as the power which assumes a protectorate there, shall accompany the respective act with a notification thereof, addressed to the other signatory powers of the present act, in order to enable them, if need be, to make good any claims of their own.

"The signatory powers of the present act recognize the obligation to insure the establishment of authority in the regions occupied by them on the coasts of the African continent sufficient to protect existing rights, and, as the case may be, free-

nation making the discovery the sole right of acquiring the soil from the natives and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.

"Those relations which were to exist between the discoverer and the natives were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them. * * * If the discovery be made, and possession of the country be taken, under the authority of an existing government, which is acknowledged by the emigrants, it is supposed to be equally well settled that the discovery is made for the whole nation, that the country becomes a part of the nation, and that the vacant soil is to be disposed of by that organ in which all vacant territory is vested by law." *Johnson v. McIntosh*, 8 Wheat. 543, 5 L. Ed. 681.

"By law of nations, recognized by all civilized states, dominion of new territory may be acquired by discovery and occupation, as well as by cession and conquest; and when citizens or subjects of one nation, in its name, and by its authority, or with its assent, take and hold actual, continuous, and useful possession (although only for the purpose of carrying on a particular business, such as catching and curing fish, or working mines) of territory unoccupied by any other government or its citizens, the nation to which they belong may exercise such jurisdiction and for such period as it sees fit over territory so acquired." *Jones v. United States*, 137 U. S. 202, 11 Sup. Ct. 80, 34 L. Ed. 691.

dom of trade and of transit under the conditions agreed upon,"⁷

The Institute of International Law, at its session in 1888, approved the plan of obligatory declaration in case of assumption of possession of such new territory, accompanied by the establishment of responsible local authority.

In early days the possession of the coast land was often made the basis of a claim to unlimited interior. "Title by occupation extends as a rule to that area, not under the jurisdiction of another state, which is necessary for the safety of the occupied area, or is naturally dependent upon it, as to the territory drained by a river of which a given state holds the mouth."⁸ The so-called "Hinterland Doctrine," maintained by some of the European states, is to the effect that the occupation of coast gives a claim to the unexplored interior. The theory of a potential right of domain without exploration or occupation has been advanced in extreme forms in some of the agreements between states as to "spheres of influence." By the declaration of Germany and Great Britain, in 1886, in regard to their spheres of influence in the Western Pacific, "Germany engages not to make acquisitions of territory, accept protectorates, or interfere with the extension of British influence, and to give up any acquisitions of territory or protectorates already established in that part of the Western Pacific lying to the east, southeast, or south of the said conventional line." Great Britain is similarly bound. Both make the following reservations: "This declaration does not apply to the Navigator Islands (Samoa), which are affected by treaties with Great Britain, Germany, and the United States; nor to the Friendly Islands (Tonga), which are affected by treaties with Great Britain and Germany; nor to the island of Niué (Savage Island), which groups of islands shall continue to form a neutral region; nor to any islands or places in the Western Pacific which are now under the sovereignty or protection of any other civilized power than Great Britain or Germany."⁹

⁷ Parl. Papers, Africa No. 4 (1885) p. 313.

⁸ Wilson & Tucker, Int. Law (5th Ed.) p. 109.

⁹ Parl. Papers, Misc. No. 2 (1898) C-9088, p. 126.

(b) Title to domain may be acquired by prescription through uninterrupted and uncontested possession going beyond memory.

The Roman law idea of "usucapio," that long-continued use of real property became transmuted into ownership, strongly influenced the early writers.¹⁰ On admission to the family of nations a previously existing state is usually regarded as having that territorial domain of which it has had long possession and such other domain as was within its effective control at the time of admission; e. g., Japan was admitted with the islands over which it had long had dominion and with Formosa, which it had obtained from China in 1895. This immemorial prescription, by which *de facto* possession was converted into *de jure* possession, has been modified by the introduction of conventional periods as sufficient to constitute possession.¹¹ The length of the necessary period has not been defined. Voluntary abandonment or dereliction by the original possessor gives to the new possessor a title by occupation, which may be strengthened by prescription.

(c) Accretion is the addition to the land area of a state through the operation of natural or artificial means. The addition to the land may be by alluvium, as when new deposits of soil are thrown above the water, or by dereliction, when the water subsides so as to leave a greater exposed area. Deltas at the mouths of rivers through accretion frequently add much to the territorial domain. The territorial domain may also be enlarged through the construction of breakwaters, dykes, or other artificial extensions of the land area of the state. Accretions, whether natural or artificial, within the boundaries of a state, belong to that state.

(d) Conquest is the forcible acquisition of territory, and is

¹⁰ Grotius, lib. II, C, IV, ix.

¹¹ The rules for determining the disputed boundary between British Guiana and Venezuela, adopted in 1897, provide: "Adverse holding or prescription during a period of fifty years shall make a good title. The arbitrators may deem exclusive political control of a district, as well as actual settlement thereof, sufficient to constitute adverse holding or to make title by prescription." *Foreign Relations U. S.*, 1896, p. 254.

regarded as an incident of national sovereignty.¹² "Conquered territory, however, is usually held as a mere military occupation until the fate of the nation from which it is conquered is determined; but if the nation is entirely subdued, or in case it be destroyed and ceases to exist, the right of occupation becomes permanent, and the title vests absolutely in the conqueror. Complete conquest, by whatever mode it may be perfected, carries with it all the rights of the former government; or, in other words, the conqueror, by the completion of his conquest, becomes the absolute owner of the property conquered from the enemy, nation, or state."¹³

(c) Cession, the transfer of the domain of one state to another state, has been very common in international practice. The form and conditions of cession have varied greatly. There may be cession as a result of war, or cession by gift, sale, exchange, or other international act. The treaty of cession usually prescribes the conditions under which the transfer is made, and unless otherwise agreed upon a treaty of cession is

¹² *Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U. S. 42, 10 Sup. Ct. 792, 34 L. Ed. 478.

¹³ "The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually they are incorporated with the victorious nation, and become subjects or citizens of the government with which they are connected. The new and old members of the society mingle with each other, the distinction between them is gradually lost, and they make one people. Where this incorporation is practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired, that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connections and united by force to strangers." *Johnson v. McIntosh*, 8 Wheat. 543, 5 L. Ed. 681.

That inhabitants should be secure in their liberty and property on transfer of sovereignty is "but the recognition of modern usages of civilized nations, which have acquired the force of law even in the case of an absolute and unqualified conquest of an enemy's country." *United States v. De Repentigny*, 5 Wall. 211, 18 L. Ed. 627; *United States v. Huckabee*, 16 Wall. 414, 21 L. Ed. 457.

binding from the date of signing.¹⁴ Spain in 1898 ceded the island of Porto Rico to the United States as a result of war. Gift of territory was common in the early days, when the territory of the state was often regarded as the personal property of the ruler, as when the Emperor Charles V conferred the Austrian provinces on Ferdinand. Spain ceded the Philippine Islands to the United States in 1898 for \$20,000,000.¹⁵ In

¹⁴ Chief Justice Marshall said:

"The sovereign who acquires an inhabited territory acquires full dominion over it; but this dominion is never supposed to divest the vested rights of individuals to property." *Delassus v. United States* (1835) 9 Pet. 117, 9 L. Ed. 71; *United States v. De la Maza Arredondo*, 6 Pet. 691, 8 L. Ed. 547; *United States v. Percheman*, 7 Pet. 51, 8 L. Ed. 604; *Strother v. Lucas*, 12 Pet. 410, 9 L. Ed. 1137; *Davis v. Concordia Parish*, 9 How. 280, 13 L. Ed. 138.

¹⁵ "By the third article of the treaty Spain ceded to the United States 'the archipelago known as the Philippine Islands,' and the United States agreed to pay Spain the sum of \$20,000,000 within three months. The treaty was ratified. Congress appropriated the money. The ratification was proclaimed. The treaty making power, the executive power, the legislative power, concurred in the completion of the transaction.

"The Philippines thereby ceased, in the language of the treaty, 'to be Spanish.' Ceasing to be Spanish, they ceased to be foreign country. They came under the complete and absolute sovereignty and dominion of the United States, and so became territory of the United States over which civil government could be established. The result was the same, although there was no stipulation that the native inhabitants should be incorporated into the body politic, and none securing to them the right to choose their nationality. Their allegiance became due to the United States, and they became entitled to its protection." *The Diamond Rings*, 183 U. S. 176, 22 Sup. Ct. 59, 46 L. Ed. 138. See, also, *De Lima v. Bidwell*, 182 U. S. 1, 21 Sup. Ct. 743, 45 L. Ed. 1041; *Dooley v. United States*, 182 U. S. 222, 21 Sup. Ct. 762, 45 L. Ed. 1074; *Downes v. Bidwell*, 182 U. S. 244, 21 Sup. Ct. 770, 45 L. Ed. 1088.

On February 14, 1899, it was resolved by Congress:

"That by ratification of the treaty of peace with Spain it is not intended to incorporate the inhabitants of the Philippine Islands into citizenship of the United States, nor is it intended to permanently annex said islands as an integral part of the territory of the United States; but it is the intention of the United States to establish on said islands a government suitable to the wants and conditions of the inhabitants of said islands to prepare them for local self-government, and in due time to make such disposition of said

1890 Germany recognized a British protectorate over Zanzibar and Pemba, and in return Great Britain ceded to Germany the island of Heligoland in the North Sea. A state may cede its own domain, in order to become a part of another state, as in the case of the annexation of the Republic of Hawaii to the United States in 1898.¹⁶

MARITIME AND FLUVIAL DOMAIN.

29. Maritime and fluvial domain includes the water area within the boundaries of a state and within conventional limits of its shores.

The Roman Law early provided that the aërial, maritime, and fluvial domain was of a less absolute character than territorial domain, stating that, unlike territory, the use of such things is common to mankind under certain limitations.¹⁷

Domain over certain water area is incident to the possession of the territorial domain, and passes to the holder of the land, though the sea and land are regarded as distinct in Great Britain.¹⁸

islands as will best promote the interests of the United States and the inhabitants of said islands."

¹⁶ For relations between United States and Hawaii, 1820 to 1893, see Foreign Relations U. S., 1894, Appendix II.

¹⁷ "Et quidem naturali jure communia sunt omnium hæc, aër, aqua profluens, et mare et per hoc litora maris. Nemo igitur ad litus maris accedere prohibetur, dum tamen villis et monumentis et ædificiis absteineat: quia non sunt juris gentium, sicut et mare." Digest, 1, 8, 2, I.

¹⁸ Molloy maintains that: "The right to the sea ariseth not from the possession of the shores; for the sea and land make distinct territories, and by the laws of England, the land is called the realm, but the sea the dominion; and as the loss of one province doth not infer that the prince must resign up the rest, so the loss of the land territory doth not by concomitancy argue the loss of the adjacent sea." De Jure Martino, c. 5.

In the discussion as to relative rights of parties to minerals under the sea above and below low-water mark in the sea adjoining Cornwall, there was no question that the land under the sea was within the domain of Great Britain and "a part of the soil and territorial possessions of the Crown." See remarks thereon in *Regina v. Keyn*, L. R. 2 Ex. Div. 63, 121, 155, 199.

(a) Waters wholly within the territorial domain of a state are under the exclusive dominion of the state. This applies particularly to inland seas, lakes, and the rivers discharging into them.

(b) Rivers flowing wholly within the territorial domain of a state are regarded as the property of that state. Domain in rivers which form the boundary line of two states, in default of other evidence, extends to the middle of the navigable channel, or thalweg. Title to the entire river may be acquired, as in cases of territorial domain.¹⁹

(c) The coast waters of the open sea to the distance of three miles from the low-water mark are for certain purposes within the maritime domain. The title to this domain goes with the title to the coast. The three-mile limit of domain has gradually received favor, though much more extended claims have been made.²⁰

¹⁹ "When a great river is the boundary between two nations or states, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when, as in this case, one state is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly-created state extends to the river only. The river, however, is its boundary, * * * Even when a state retains its dominion over a river which constitutes the boundary between itself and another state, it would be extremely inconvenient to extend its dominion over the land on the other side, which was left bare by the receding of the water. And this inconvenience is not less where the rising and falling is annual than where it is diurnal. Wherever the river is a boundary between states, it is the main, the permanent, river which constitutes that boundary; and the mind will find itself embarrassed with unsurmountable difficulty in attempting to draw any other line than the low-water mark." *Handly v. Anthony*, 5 Wheat. 374, 5 L. Ed. 113.

²⁰ Selden, *Mare Clausum*, published in 1635, opposed Grotius' *Mare Liberum*, published 1609, and maintained that British sovereignty over the coast sea extended even to the North Pole, and that the sea might properly be private property. Many writers also followed Selden's claim that the *fundus maris*, or the sea bottom, was a "part of the waste and demesnes and dominions of the King of England." Till the decision in *Regina v. Keyn* [1876] L. R. 2 Ex. Div. 63, the British limits of maritime domain were subject to dispute. This decision was followed by an act of Parliament, "Territorial Waters Jurisdiction Act, 1878," which provided: "The territorial waters of

(d) Gulfs, bays, and other arms of the sea, whose openings toward the sea do not exceed six miles in width, are uniformly regarded as within the maritime domain of the state which holds the coast land. There are various claims to more extended domain.

AËRIAL DOMAIN.

30. Aërial domain includes the atmosphere above the territorial, maritime, and fluvial domain of a state.

The dominion over the air has received consideration for many years. Some would date the discussion from the first chapter of the book of Genesis, when man is given "dominion over the fish of the sea and over the fowl of the air." Of this Pufendorf in 1672 says: "We cannot conceive any supremacy and rule over animals, without a right of using the element which they inhabit, according as the nature of it will allow. Indeed, mention is likewise made of the fowls of the air, yet since we cannot move and support ourselves in that element alone, therefore we are unable to exercise dominion over the air any further than we can reach while we stand on the earth."²¹ Early writers, however, recognize certain rights in the atmosphere, as the right to the wind for mills depending upon currents of air for power, as later mills depended upon the force of water. The early writers usually referred to the Roman law principle that by the law of nature the air, running water, the sea, and shores of the sea were common to mankind.²²

Her Majesty's dominions, in reference to the sea, means such part of the sea adjacent to the coast of the United Kingdom, or the coast of some other part of Her Majesty's dominions, as is deemed by international law to be within the territorial sovereignty of Her Majesty; and for the purpose of any offense declared by this act to be within the jurisdiction of the Admiral, any part of the open sea within one marine league of the coast measured from low-water mark shall be deemed to be open sea within the territorial waters of Her Majesty's dominions."

²¹ Pufendorf, *The Law of Nature and Nations* (Kennet's Trans.) bk. IV, c. V, § V.

²² *Institutes*, lib. II, tit. I, 1. See, also, Nys, *Droit et Aërostats* Rev. de Droit Int. et de Leg. Comparée (2^e série) IV, p. 510.

The atmosphere above the state is within its domain, and this is generally recognized in the unquestioned appropriation of the space above the state area for the erection of buildings, monuments, bridges, etc., as well as in the ordinary use of the atmosphere. It would not be reasonable to attribute to a state property rights in the atmosphere. Such rights would neither be consistent with the nature of the atmosphere itself nor with the rights of others. Yet, with the increasing use of the atmosphere for aerial transportation both of messages and persons, it is evident that it cannot be regarded as in all respects *res nullius*.

With the development of modern war balloons and of wireless telegraphy, there would naturally be a corresponding development of dominion over the atmosphere. The war balloons would bear a close resemblance to war ships in certain respects; e. g., the war ship might sink if its buoyancy were reduced through the entrance of water, while the balloon might sink if its buoyancy were reduced through the entrance of air. In time of peace, unregulated use of the atmosphere by wireless telegraphy might destroy the efficiency of this means of communication. Photographing of or observations upon fortifications from any means of aerial transportation would be no less objectionable, because made from above, rather than on the surface of a state. States have already begun to make agreements upon the subject of wireless telegraphy. The Institute of International Law at its session in 1906 declared that, while the air was free, a state had the right to regulate the use of the atmosphere above its territorial and maritime domain for the transmission of wireless messages, whether from public or private stations on land, or sea, or in the air.²³

The United States has in recent years asserted that the atmosphere was within the domain of the state.

In the case of *Georgia v. Tennessee Copper Co.*, in 1906, the Supreme Court of the United States said that, while the state itself owned very little of the property alleged to have been damaged by the discharge of gases into the air, yet in its capacity of quasi sovereign "the state has an interest, independ-

²³ 21 *Annuaire de l'Institut*, p. 327. See post, p. 122, note 52, chapter IV.

ent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.”²⁴

In 1907 the Supreme Court of the United States said that: “It is recognized that the state, as quasi sovereign and representative of the interests of the public, has a standing in court to protect the atmosphere, the water, and the forests within its territory, irrespective of the assent of the private owners of the land most immediately concerned.”²⁵

The German Civil Code, which came into effect January 1, 1900, announces certain principles in regard to the rights of the owner of land in the atmosphere:

“904. The owner of a thing has not the right to prohibit the interference of another with the same, if the interference is necessary to avert a present danger and the threatened damage compared to the damage arising to the owner from the interference is disproportionately great. The owner may demand indemnity for the damage to him.

“905. The right of the owner of a piece of land extends to the space above the surface and to the earth under the surface. However, the owner cannot prohibit interferences which take place at such height or depth that he has no interest in their exclusion.

“906. The owner of a piece of land cannot prohibit the incoming of gases, steam, odors, smoke, soot, heat, noises, shocks and similar interference coming from another piece of land in so far as the interference does not, or only inconsiderably, affect the use of his land, or so far as it is caused by a use of the other piece of land, which under the local condition is usual with land in such situation. The introduction through a special channel is not permissible.”²⁶

Other codes enunciate similar principles, showing that the owner of the land has a right to demand that the use of the atmosphere above the land may not be to his serious detriment.

²⁴ 206 U. S. 230, 27 Sup. Ct. 618, 51 L. Ed. 1038.

²⁵ Hudson County Water Co. v. McCarter, 209 U. S. 349, 28 Sup. Ct. 529, 52 L. Ed. 828.

²⁶ Loewy, German Civil Code, Nos. 904-906.

The general drift of opinion is toward the recognition that the right of aerial dominion is coterminous with the territorial jurisdiction of a state, and that to the extent a state is able to enforce its jurisdiction within such area it must be recognized, provided it is not an infringement of the rights of other states.²⁷

²⁷ See 2 Holtzendorff, Handbuch, § 46; 1 Rivier, Droit de Gens, p. 140; 1 Nys, Droit Int p. 523; 4 A. J. I. L. Baldwin, Law of the Air Ship, p. 95; Id., Kuhn, Beginnings of an Aërial Law, p. 108.

CHAPTER IV.

JURISDICTION.

31. Jurisdiction.
32. Jurisdiction over Territory and Property—General.
33. Joint Jurisdiction.
34. Leased Territory.
35. Maritime and Fluvial Jurisdiction—Marginal Seas.
36. Straits.
37. Gulfs and Bays.
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43. Aërial Jurisdiction.
44. Jurisdiction over Persons—Nationals.
45. Acquisition of Nationality.
46. Expatriation.
47. Protection of Nationals.
48. Aliens.
49. Extradition.
50. Exemptions from Jurisdiction.
51. Extraterritorial Jurisdiction.
52. Servitudes.

JURISDICTION.

- 31. Jurisdiction, the right to exercise state authority, extends in general to all persons and things within the boundaries of the state, and, conditioned by the rights of other states, to the property and subjects of the state beyond its boundaries.¹**

Jurisdiction, the right to exercise state authority, may have its basis in property right, in the right of domain, or in political

¹ Mr. Justice Story said in 1822: "It may therefore be justly laid down as a general proposition that all persons and property within the territorial jurisdiction of a sovereign are amenable to the jurisdiction of himself or his courts, and that the exceptions to this rule are such only as by common usage and public policy have been allowed, in order to preserve the peace and harmony of nations, and to regulate their intercourse in a manner best suited to their

relationship, and may extend where property or domain does not exist.

In general, jurisdiction may be classified as (a) jurisdiction over territory and property; (b) maritime and fluvial jurisdiction; (c) aerial jurisdiction; and (d) jurisdiction over persons.

JURISDICTION OVER TERRITORY AND PROPERTY —GENERAL.

32. As a general principle the jurisdiction of a state is exclusive over its own land area, and over all property within its boundaries, and over its own and the property of its nationals which is not within the boundaries of another state.

Chief Justice Marshall in 1812 said:

“The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its own sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restrictions.

“All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

“This consent may be either expressed or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction, but, if understood, not less obligatory.”²

As against all other states, a state is regarded as proprietor of the land within its boundaries. A state may not exercise any act of state authority upon the land of a foreign sovereign without permission; e. g., may not march troops upon foreign land even in time of peace.

A state has exclusive jurisdiction over its property and the dignity and rights.” *The Santissima Trinidad*, 7 Wheat. 283, 5 L. Ed. 454.

² *Schooner Exchange v. McFaddon*, 7 Cranch, 116, 3 L. Ed. 287.

property of its subjects outside the boundaries of any other state. This jurisdiction extends over property throughout its own domain and throughout the extent of space which is within the dominion of no state, as on the high seas for property under its own flag.

This jurisdiction over property extends to patents, copyrights, etc., which may be made the subject of international agreement. The jurisdiction over property and territory implies the right to protect territory and property by such means as may be necessary.

SAME—JOINT JURISDICTION.

33. In recent years joint jurisdiction has been in certain instances exercised by two or more states in the same area in accord with conventional agreements.

The exercise of joint jurisdiction—condominium—does not necessarily imply the possession of sovereignty by those states exercising jurisdiction. The local state possessing sovereignty may or may not itself be a party to the agreement. The authority exercised is specified in the agreement, and an obligation corresponding to the right is generally assumed, unlike the usual practice in case of assumption of a sphere of influence.

The condominium would naturally be based on conventional agreement, in order that there might not be conflict of jurisdiction. The exercise of power may cease with the joint sanction of the appointment of an official to represent the states in all matters, or the jurisdiction over specified matters may be retained by each state.

By a general act, concluded by the United States, Germany, and Great Britain in 1889, and remaining in force till 1899, article I:

“It is declared that the Islands of Samoa are neutral territory in which the citizens and subjects of the three signatory powers have equal rights of residence, trade and personal protection. The three powers recognize the independence of the Samoan government and the free right of the natives to elect their chief or king and choose their form of government ac-

ording to their own laws and customs. Neither of the powers shall exercise any separate control over the islands or the government thereof.

"It is further declared, with a view to the prompt restoration of peace and good order in the said islands, and in view of the difficulties which would surround an election in the present disordered condition of their government, that Malietoa Laupepa, who was formerly made and appointed king on the 12th day of July, 1881, and was so recognized by the three powers, shall again be so recognized hereafter in the exercise of such authority, unless the three powers shall by common accord otherwise declare; and his successor shall be duly elected according to the laws and customs of Samoa."

This general act provides for the establishment of a "Supreme Court of Justice for Samoa," with extended powers for taxation and other matters of administration.

By an agreement of January 19, 1899 between Great Britain and Egypt as to the condominium over Soudan:

"II. The British and Egyptian flags shall be used together on land and water throughout the Soudan. * * *

"III. The supreme military and civil command in the Soudan shall be vested in one officer, termed the 'Governor General of the Soudan.' He shall be appointed by Khedviral decree on the recommendation of Her Britannic Majesty's government."³

The Convention of October 20, 1906 between Great Britain and France concerning the New Hebrides is one of the most detailed statements as to the exercise of joint jurisdiction. The general provisions state:

"Article I. Status—1. The group of the New Hebrides, including the Banks and Torres Islands, shall form a region of joint influence, in which the subjects and citizens of the two signatory powers shall enjoy equal rights of residence, personal protection, and trade, each of the two powers retaining jurisdiction over its subjects or citizens, and neither exercising a separate control over the group.

"2. The subjects or citizens of other powers shall enjoy the same rights and shall be subject to the same obligations as British subjects or French citizens. They must choose within

³ 19 Br. and For. State Papers, 119.

six months between the legal systems of one of the two powers. Failing such choice, the High Commissioners mentioned in article II or their delegates shall decide under which system they shall be placed.

"3. In all matters not contrary to the provisions of the present Convention or the regulations made thereunder, the subjects and citizens of the two signatory powers and the subjects and citizens of other powers shall, within the New Hebrides, remain subject to the fullest extent to the laws of their respective countries.

"4. The two signatory powers undertake not to erect fortifications in the group and not to establish penal settlements of any kind."

The sixty-eight articles of this Convention provide with much detail for the condominium, even to the regulation of labor and the sale of liquors.⁴

SAME-LEASED TERRITORY.

34. Leased territory, while remaining under the sovereignty of the lessor, passes within the jurisdiction of the lessee.

Instances of leasing territory for various purposes have from time to time occurred. The most numerous are the Chinese leases. The leases have usually been to European powers.

The lease to Germany in 1897 states that:

"His Majesty, the Emperor of China, being desirous of preserving the existing good relations with His Majesty, the Emperor of Germany, and of promoting an increase of German power and influence in the Far East, sanctions the acquirement, under lease, by Germany of the land extending for 100 li at high tide (at Kiaochow).

"His Majesty, the Emperor of China, is willing that German troops should take possession of the above-mentioned territory at any time the Emperor of Germany chooses. China retains her sovereignty over this territory, and should she at any time

⁴ 1 A. J. I. Doc. p. 179. See, also, Politis, *Le Condominium Franco-Anglais des Nouvelles Hebrides*, p. 32 et seq.

wish to enact laws or carry out plans within the leased area she shall be at liberty to enter into negotiations with Germany with reference thereto: Provided, always, that such laws or plans shall not be prejudicial to German interests. Germany may engage in works for the public benefit, such as waterworks, within the territory covered by the lease, without reference to China. Should China wish to march troops or establish garrisons therein, she can only do so after negotiating with and obtaining the express permission of Germany.

"II. His Majesty, the Emperor of Germany, being desirous, like the rulers of certain other countries, of establishing a naval and coaling station and constructing dockyards on the coast of China, the Emperor of China agrees to lease to him for the purpose all the land on the southern and northern sides of Kiaochow Bay for a term of ninety-nine years. Germany is to be at liberty to erect forts on this land for the defense of her possessions therein.

"III. During the continuance of the lease China shall have no voice in the government or administration of the leased territory. It will be governed and administered during the whole term of ninety-nine years solely by Germany, so that the possibility of friction between the two powers may be reduced to the smallest magnitude. * * * Germany shall not cede the territory leased to any other power than China." ⁵

Mr. Conger, Minister to China in 1899, reported in 1899:

"I have conferred with the English, German, Russian, French, Spanish, Netherlands, and Japanese ministers upon the subject and all of them, except the Japanese, agree that the control over all of these leased ports has, during the existence of the lease, passed as absolutely away from the Chinese government as if the territory had been sold outright, and that they are as thoroughly under jurisdiction of the lessee governments as any portion of their home territory, and their consuls, accredited to China, would not attempt to exercise jurisdiction in any of said ports.

"The Japanese claim that sovereignty is too important a matter to pass thus with a lease, and say that China can, if she wishes, surrender jurisdiction over her own people; but they

⁵ Foreign Relations U. S., 1900, p. 383.

do not agree that these lessee governments shall or can exercise jurisdiction over other foreigners in the leased territory. However, no case has yet arisen for them to test the matter."⁶

The Chinese lease of Port Arthur to Russia in 1898 distinctly stated that it was "on the understanding that such lease shall not prejudice China's sovereignty over this territory," though full jurisdiction over the territory passed to Russia and subsequently to Japan.

In the Agreement of February, 1903, between the United States and Cuba for the lease of certain coaling and naval stations to the United States, it is provided that:

"Article III. While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above-described areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas, with the right to acquire (under conditions to be hereafter agreed upon by the two governments) for the public purposes of the United States any land or other property therein by purchase or by exercise of eminent domain with full compensation to the owners thereof."

The terms of leases usually specify the powers to be exercised by the lessee, and by implication other powers remain in the lessor. In all these cases sovereignty is theoretically retained by the lessor state, while complete jurisdiction may be granted to the lessee.

MARITIME AND FLUVIAL JURISDICTION—MARGINAL SEAS.

35. A marine league from the shore low-water mark has long been recognized as the limit of maritime jurisdiction.

In the early days of interstate relationship there was much controversy over the limits of maritime jurisdiction. In 1702 Bynkershoek set forth the reasonable proposition that the territorial power should end where the effective range of arms

⁶ Id. p. 385.

ends.⁷ At this time the range of guns was considered about three miles. There have been various attempts to extend this jurisdiction, but the marine league is still generally accepted for ordinary purposes.⁸ The three-mile limit was legalized by the British Territorial Waters Jurisdiction Act of 1878, was recognized in the Suez Canal Convention of 1888, in the Fur Seal Arbitration of 1893, and in the Hay-Pauncefote Treaty of 1901. "Article 21 of the Russian Prize Law provides: 'The right of making prizes is recognized only in the open seas. As for the open sea, it consists of waters which are not under fire of neutral batteries, or three sea miles from the neutral shores.'"⁹ Kent made an extreme claim, saying, "All that can reasonably be asserted is that the dominion of the sovereign of the shore over the contiguous sea extends as far as is requisite for his safety and for some lawful end," and says that "in 1793 the government of the United States thought they were entitled, in reason, to as broad a margin of protected navigation as any nation whatever, though at that time they did not positively insist upon more than the distance of a marine league from the seashores; and in 1806 they thought it would not be unreasonable, considering the extent of the United States, the shoalness of their coast, and the natural indication furnished by the well-defined path of the Gulf Stream, to expect an immunity from belligerent warfare for the space between that limit and the American shore."¹⁰ The Institute of International Law dis-

⁷ "Potestatem terræ finiri, ubi finitur armorum vis." De Domino Maris (1702) c. 2.

⁸ "There can be no possible doubt that the water below low-water mark is part of the high seas. But it is equally beyond question that for certain purposes every country may, by the common law of nations, legitimately exercise jurisdiction over that portion of the high seas which lies within the distance of three miles from its shores. Whether this limit was determined with reference to the supposed range of cannon, on the principle that the jurisdiction is measured by the power of enforcing it, is not material; for it is clear, at any rate, that it extends to the distance of three miles, and that many instances may be given of the exercise of such jurisdiction by various nations." *Screw Collier Co. v. Schurmans*, 1 Johnson & H. Ch. 193.

⁹ *Foreign Relations U. S.*, 1886, p. 957.

¹⁰ *Int. Law* (Abdy's Ed.) p. 112.

cussed the question of maritime jurisdiction at great length at its session in 1894, and the general opinion was favorable to an extension of the three-mile limit. A large majority declared in favor of a six-mile limit, with a right of extension by declaration of a neutral state in time of war to the limit of effective control by guns on shore. Since 1894 there has been a tendency to return to the three-mile limit of jurisdiction, because the more extended jurisdiction would carry corresponding obligations to exercise authority, a burden which might outweigh the advantages, particularly in time of war.

Within the three-mile limit exclusive jurisdiction over fisheries and other undertakings is generally admitted.

A wider special jurisdiction is often claimed, and generally admitted, for purposes of administration of revenue, fisheries, and sanitary regulations, and for better policing of a coast. This has often extended to ten miles, and sometimes to twelve miles. States often make regulations for the coast trade, limiting such trade to vessels flying their own flag.

SAME—STRAITS.

36. (a) The rule in regard to marginal seas applies to straits which are six miles or more in width.

(b) Straits less than six miles in width are within the jurisdiction of the shore state or states.

(a) When a strait is six miles in width, if the same state has jurisdiction over both shores, the strait is wholly within the jurisdiction of that state. If different states have jurisdiction over the opposite shores, each state has jurisdiction to the three-mile limit. Similar jurisdiction prevails in case the strait is more than three miles in width.

(b) When straits are less than six miles in width, in absence of conventional agreement, each shore state has jurisdiction to the middle of the navigable channel.

In general, it may be said that the claims to jurisdiction of broad straits and channels which were formerly made seem to have been surrendered. Great Britain once claimed the Bristol Channel, St. George's Channel, and the North Channel as within her territorial jurisdiction, and some eminent writers, such

as Phillimore, have supported this claim; but this would hardly be maintained since the Territorial Waters Jurisdiction Act of 1878.

Some straits have been made the subject of special agreements. By article I of the Convention of London of July 10, 1841, warships were excluded from the Bosphorus and Dardanelles. This regulation was reaffirmed by the Treaty of Paris in 1856 and by the Treaty of London in 1871. By this latter treaty provision was made for entrance of warships for the purpose of assuring the execution of the provisions of the Treaty of Paris of 1856. The United States has never formally admitted the right to exercise this exclusive jurisdiction. The right of navigation is, however, distinct from the right of jurisdiction.

SAME—GULFS AND BAYS.

- 37. Over gulfs and bays wholly within the territorial limits, and over such as are not more than six miles in width at the opening into the sea, the jurisdiction is in the shore state or states. More extended jurisdiction is in some cases claimed and admitted.**

When the opening to the sea from a gulf or bay is six miles or less in width, and the jurisdiction of both shores is in one state, that state has jurisdiction over the gulf or bay. When the shore is in the jurisdiction of different states, the middle of the navigable waters is usually considered the limit of jurisdiction, in absence of agreement.

Claims to jurisdiction over waters of large area and having wide openings toward the sea have been made.¹¹ James I of

¹¹ "Passing from the common law of England to the general law of nations, as indicated by the text-writers on international jurisprudence, we find a universal agreement that harbors, estuaries, and bays landlocked belong to the territory of the nation which possesses the shores round them, but no agreement as to what is the rule to determine what is 'bay' for this purpose.

"It seems generally agreed that, where the configuration and dimensions of the bay are such as to show that the nation occupying the adjoining coasts also occupies the bay, it is part of the territory, and, with this idea, most of the writers on the subject refer to defensibility from the shore as the test of occupation; some suggesting,

England made extensive claims to the waters within lines drawn from headlands about England. These were called King's Chambers.¹²

Conventional agreements as to boundaries have been made when the openings of waters toward the sea have exceeded the six-mile limit.¹³ Certain gulfs and bays having wide openings toward the sea and of large surface area are generally regarded as within the boundaries of the shore states, as in case of the Delaware and Chesapeake Bays in the United States.¹⁴

therefore, a width of one cannon-shot from shore to shore, or three miles; some, a cannon-shot from each shore, or six miles; some, an arbitrary distance of ten miles. All of these are rules which, if adopted, would exclude Conception Bay from the territory of Newfoundland, but also would have excluded from the territory of Great Britain that part of the Bristol Channel which in *Reg. v. Cunningham*, 1 Bell's Cr. Cas. 72, was decided to be in the county of Glamorgan. On the other hand, the diplomatists of the United States in 1793 claimed a territorial jurisdiction over much more extensive bays, and Chancellor Kent, in his *Commentaries*, though by no means giving the weight of his authority to this claim, gives some reason for not considering it altogether unreasonable."

Direct U. S. Cable Co. v. Anglo-American Tel. Co., L. R. 2 App. Cas. (1877) 419.

"Where two nations are possessed of territory on opposite sides of a bay or navigable river, the sovereignty of each presumptively extends to the middle of the water from any part of their respective shores." 5 Ops. Attys. Gen. 412.

¹² Selden, *Mare Clausum*, c. 22.

¹³ Boundary Treaty between United States and Great Britain, 1846, art. 1: "From the point on the forty-ninth parallel of north latitude where the boundary laid down in existing treaties and conventions between the United States and Great Britain terminates, the line of boundary between the territories of the United States and those of Her Britannic Majesty shall be continued westward along the said forty-ninth parallel of north latitude to the middle of the channel which separates the continent from Vancouver's Island; and thence southerly through the middle of the said channel, and of Fuca's Straits to the Pacific Ocean: Provided, however, that the navigation of the whole of the said channel and Straits, south of the forty-ninth parallel of north latitude, remain free and open to both parties."

¹⁴ "The question of jurisdiction over many such partly included bodies of water, sometimes called 'closed seas,' has already been decided. The Chesapeake and Delaware Bays are recognized as parts of the territory of the United States; Hudson Bay and the Irish

The Institute of International Law in 1894 adopted twelve miles as the width of mouth of inclosed gulfs and bays.¹⁵ The ten-mile width of mouth for inclosed gulfs and bays has received much sanction in recent years.¹⁶ From whatever line is rec-

Sea as British territory; the Caspian Sea belongs to Russia; Lake Michigan to the United States. The Black Sea, before Russia obtained a foothold upon it, formed part of the territories of the Ottoman Porte; it is now subject to the joint jurisdiction of Turkey and Russia. The Baltic is acknowledged to have the character of a closed sea (and to be subject to the control of the powers surrounding it), certainly to the extent of guaranteeing it against acts of belligerency when the powers within whose territory it lies are at peace." Davis, *Elements of Int. Law*, p. 58.

¹⁵ 13 *Annuaire de l'Institut*, 329.

"In conformity with your recent oral request, I have now the honor to make further response to your unofficial note of November 5th last, which was acknowledged on the 9th of the same month, by informing you that careful consideration would be given to the important inquiry therein made as to the views of the United States government touching the expediency of settling by treaty among the interested powers the question of the extent of territorial jurisdiction over maritime waters.

"This government would not be indisposed, should a sufficient number of maritime powers concur in the proposition, to take part in an endeavor to reach an accord having the force and effect of international law, as well as of conventional regulation, by which the territorial jurisdiction of a state, bounded by the high seas, should henceforth extend six nautical miles from low-water mark, and at the same time providing that this six-mile limit shall also be that of the neutral maritime zone.

"I am unable, however, to express the views of this government upon the subject more precisely at the present time, in view of the important consideration to be given to the question of the effect of such a modification of existing international and conventional law upon the jurisdictional boundaries of adjacent states and the application of existing treaties in respect to the doctrine of headlands and bays.

"I need scarcely observe to you that an extension of the headland doctrine, by making territorial all bays situated within promontories twelve miles apart, instead of six, would affect bodies of water now deemed to be high seas and whose use is the subject of existing conventional stipulations."

Mr. Olney, Sec. of State, to Mr. de Weckherlin, Dutch Min., Feb. 15, 1896, MS. Notes to the Netherlands, VIII, 359, cited in 1 Moore, § 152, p. 734.

¹⁶ 1 Rivier, *Principes de Droit des Gens*, 154; Bonfils, *Droit Int Public*, 516; Perels, *Seerecht*, § 5.

ognized as the boundary of the mouth of an inclosed gulf or bay the maritime jurisdiction is held to extend to a distance of three miles from this line.¹⁷

A case arose relating to the jurisdiction over Conception Bay, which is more than twenty miles in width at its mouth. A cable was laid within the Bay, and at all points more than three miles distant from the shore. While admitting there was great diversity of opinion as to what constituted water of such description territorial, the court held that this was within British jurisdiction, "that in point of fact the British government has for a long period exercised dominion over this bay, and that their claim has been acquiesced in by other nations, so as to show that the bay has been for a long time occupied exclusively by Great Britain, a circumstance which in the tribunals of any country would be very important. And moreover (which in a British tribunal is conclusive) the British legislature has by acts of Parliament declared it to be part of the British territory, and part of the country made subject to the legislature of Newfoundland."¹⁸

SAME—INLAND SEAS AND LAKES.

38. In general, the jurisdiction over inclosed waters is in the state whose land surrounds the water.

If an inland sea or lake is surrounded by land belonging to two or more states, in absence of conventional agreement, jurisdiction is in each state in proportion to its coast line.

Such inclosed waters as Lake Baikal, Aral Sea, Dead Sea, the Swiss and English lakes, Lake Winnipeg, or Lake Michigan, are wholly within the exclusive jurisdiction of the states

¹⁷ "Article 8. Under the territory of the kingdom is also included the seacoast to within a distance of three nautical miles of 60° latitude at low-water mark. In regard to bays, that distance of three nautical miles shall be measured from a straight line athwart the bay as close as possible to the entrance at the first point at which the entrance to the bay exceeds ten miles of 60° latitude." Netherlands Proclamation of Neutrality, Russo-Japanese War, 1904.

¹⁸ Direct U. S. Cable Co. v. Anglo-American Telegraph Co., [1877] L. R. 2 App. 394.

whose land surrounds them. A state may exercise its jurisdiction over landlocked waters as over the land within its boundaries.

If an inland sea or lake is surrounded by land belonging to different states, the jurisdiction over the water area has been generally considered to reside in the surrounding states, though the right to navigate the waters is conceded to all the states whose lands touch the inclosed waters. The exercise of jurisdiction by different states over the waters of an inclosed sea or lake has usually been regulated by conventional agreement. The rights to the Caspian Sea are specified under the treaties between Russia and Persia of 1813 and 1828; the Black Sea has been the subject of many negotiations, and by treaty opened to merchant vessels;¹⁹ Lake Constance is considered as belonging to Germany, Switzerland, and Austria.

The boundary between the United States and Canada in the Great Lakes was provided for in the Treaty of Peace between the United States and Great Britain in 1783 as in the middle of Lakes Ontario, Erie, and Huron, and to the north of the middle of Lake Superior. Under the Treaty of 1814, article VII, commissioners were to be appointed to make these boundaries more definite. Several subsequent treaties provided for the maintenance of naval force on the Lakes by the United States and by Great Britain, for the navigation of the boundary waters and of the rivers flowing from the Lakes, for wrecking privileges,²⁰ etc. The decisions of the United States courts upon the nature of the jurisdiction to be exercised over the Great Lakes have not always been consistent as regards municipal law,²¹ though the claim of exclusive jurisdiction up to the Canadian boundary line has been repeatedly affirmed by the United States and admitted by Great Britain.

A decision of the United States Supreme Court in 1892 states that "the Great Lakes are not in any appreciable respect affected by the tide, and yet on their waters, as said above, a

¹⁹ See Treaty of Paris, 1856, and Treaty of London, 1871.

²⁰ Foreign Relations U. S., 1893, pp. 341-344.

²¹ United States v. Rodgers, 150 U. S. 249, 14 Sup. Ct. 109, 37 L. Ed. 1071; Illinois Central Railroad v. Illinois, 146 U. S. 387, 13 Sup. Ct. 110, 36 L. Ed. 1018.

large commerce is carried on, exceeding in many instances the entire commerce of states on the borders of the sea. When the reason of the limitation of admiralty jurisdiction in England was found inapplicable to the condition of navigable waters in this country, the limitation and all its incidents were discarded. So also, by the common law, the doctrine of the dominion over and ownership by the crown of lands within the realm under tide waters is not founded upon the existence of the tide over the lands, but upon the fact that the waters are navigable; 'tide waters' and 'navigable waters,' as already said, being used as synonymous terms in England. The public being interested in the use of such waters, the possession by private individuals of lands under them could not be permitted except by license of the crown, which could alone exercise such dominion over the waters as would insure freedom in their use so far as consistent with the public interest. The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment, a reason as applicable to navigable fresh waters as to waters moved by the tide. We hold, therefore, that the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies, which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters on the borders of the sea, and that the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations." ²²

SAME—RIVERS.

- 39. (a) A state has exclusive jurisdiction over rivers wholly within its boundaries.**
(b) When a river flows through two or more states, each state has jurisdiction over that part wholly within its boundaries.
(c) When a river flows between two states, each state, in absence of other agreement, has jurisdiction to the middle of the river, or in case of a navigable river to the middle of the main channel, or thalweg.

²² *Illinois Central Railroad v. Illinois, Id.*

Jurisdiction over rivers should be distinguished from the subject of navigation of rivers. Jurisdiction gives to the state entitled to it the right to exercise state authority within its limits. This control may be subject to certain restrictions as in case of rights to navigate a navigable stream. The general principle is that the jurisdiction over a river is in the riparian state or states.

(a) Rivers which are wholly within the boundaries of one state can have no divided jurisdiction, but are subject to its exclusive jurisdiction. To such rivers the state can apply any regulations at will, unless rights have been waived by international agreements. In speaking of the Hudson river in 1892, Secretary Foster said that certain foreign claims in regard to its use ignored "the salient fact that the Hudson river is a natural water way, rising and lying wholly within the territory of the United States, and in no sense an international water course, to which the riparian rules of international law are applicable."²³

(b) A river, whose course is partly within the boundaries of one state and partly within the boundaries of another, is for each part within the jurisdiction of the state within which that part may flow. It is considered that a state nearer the mouth of a river has a right to demand that a state nearer the source shall not deprive it of rights which it has in the flow of water, and, though the state or states nearer the source have a right to reasonable use of flowing water, they have not a right to appropriate the water to the undue injury of the state below.²⁴

(c) "When a navigable river constitutes the boundary between two independent states, the line defining the point at which the jurisdiction of the two separates is well established to be the middle of the main channel of the stream. The interest of each state in the navigation of the river admits of no other line. The preservation by each of its equal right in the navigation of the stream is the subject of paramount interest. It is, therefore, laid down in all the recognized treatises on international law of modern times that the middle of the chan-

²³ Foreign Relations U. S., 1892, p. 337.

²⁴ 1 Moore, § 132, p. 653; *State of Kansas v. State of Colorado et al.* (1907) 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956.

nel of the stream marks the true boundary between the adjoining states, up to which each state will, on its side, exercise jurisdiction. In international law, therefore, and by the usage of European nations, the term 'middle of the stream,' as applied to a navigable river, is the same as the middle of the channel of such stream."²⁵ When a river is not navigable, it is held that the jurisdiction of the states upon the opposite banks extends to the middle of the stream.

When the river suddenly changes its course and seeks a new channel, the limits of jurisdiction remain at the middle of the old channel. The limits of jurisdiction are, however, liable to gradual change through the change of the course of the stream by the deposit of alluvial formation. In such case the losses and gains would ordinarily be equivalent.

Questions of a more complicated nature may arise when the states upon opposite banks of a boundary river wish to divert a portion of the water. In 1897 the Swiss Federal Court decided that the canton of Schaffhausen had no jurisdiction over the southern half of the waterfall of the Rhine, which the canton of Lurich wished to exploit for power. This did not, however, define the respective rights of the two cantons. Professor Huber was asked for an opinion upon this phase of the relations of the two cantons. In this opinion he says:

"The text-writers, the practice of courts, and particularly the intercantonal and international practice, agree on the whole that each riparian owner has on principle full control over one-half of the river, and, therefore, may grant concessions for works located exclusively on its side, but that the adjoining state has an international right of protest, which cannot be lost through conflicting private rights, against all measures which may affect its territory injuriously. Joint action, though not a joint granting of concessions, is necessary in all cases where a single establishment affects both territories. With respect to rights in the river both riparian states stand upon an absolute equality."²⁶

²⁵ *Iowa v. Illinois*, 147 U. S. 1, 13 Sup. Ct. 239, 37 L. Ed. 55.

²⁶ Translated in 1 A. J. I. p. 246.

NAVIGATION.

40. (a) The high seas beyond the marine league are open to the free navigation of all states.

(b) There is a qualified right of navigation in most other waters.

(a) While there were attempts to control the navigation of the open seas in early days, in recent years the principle of free navigation has not been questioned, though a certain degree of control over the high seas is claimed and admitted for revenue and sanitary purposes as regards vessels approaching port.

(b) The navigation of other waters is usually subject to a measure of jurisdiction varying according to the nature of waterway and of local control. Where there is what may be called a general or special right of navigation by other states of waters within the domain of a state, it partakes of the nature of a servitude.

Marginal Sea.

Within the three-mile limit innocent passage of vessels sailing the open sea is uniformly permitted. In time of war restrictions may be prescribed in regard to conduct within this limit. In the time of peace the coast state may prescribe regulations in regard to trade, fishing, revenue, pilotage, quarantine, ceremonials, etc., to which vessels coming within the jurisdiction may be obliged to conform. Foreign vessels simply passing through the marginal sea are not usually regarded as liable to the local jurisdiction unless involved in some act which takes effect outside the vessel.

Gulfs and Bays.

In general there are the same rules for navigation of gulfs and bays as for the marginal sea. The navigation of waters in the neighborhood of fortifications is sometimes forbidden or regulated.

Straits.

The general rule is that straits connecting free seas are open to innocent navigation.

Denmark for several centuries collected toll on vessels and cargoes passing between the North and Baltic Seas, and justi-

fied this action on the ground of ancient usage, and on the ground of keeping up the lights and police of the Danish Sounds. These tolls were known as the "Danish Sound Dues." The European states in 1857 paid Denmark a sum in capitalization of the dues, while at the same time the United States paid \$393,011 in consideration that Denmark would secure free and unincumbered navigation of American vessels through the Sound and Belts forever.²⁷

While the Black Sea was wholly within Turkish jurisdiction, the navigation of the Bosphorus and Dardanelles was in the control of Turkey. From 1774 treaties opened the straits to navigation by merchant vessels. The exclusion of war vessels was accepted by Austria, France, Great Britain, Prussia, and Russia in the Convention of London in 1841, and again confirmed by the Treaty of Paris, 1856, though by the Treaty of London, 1871, the Sultan may, for executing the Treaty of Paris of 1856, "open the said straits in time of peace to the vessels of war of friendly and allied powers." The United States, though not a party to these treaties, has acquiesced in their provisions.²⁸ Great Britain protested against the passage of the Straits in 1902 by Russian torpedo destroyers, even though disarmed and under the Russian merchant flag. On July 28, 1904, Mr. Balfour in the British House of Commons said of the vessels of the Russian volunteer fleet which passed the Dardanelles: "We took the strongest possible exception to that course on the ground that no ship of war could issue from the Black Sea, and that in our judgment the members of the volunteer fleet, if they issued from the Black Sea and took belligerent action, either had no right to issue or no right to take that action."

Canals.

Canals are artificial waterways. They are constructed within the jurisdiction of a state or states, and in absence of international agreement are subject to the jurisdiction within which they may be.

Certain canals are almost wholly national in character, and while shortening somewhat the routes of commerce, as af-

²⁷ Article III, Treaty of April 11, 1857.

²⁸ 1 Moore, § 134, p. 664.

fording convenient routes, are not essential for international communication, nor would the closing of them greatly interfere with the movement of world commerce. Such canals are the Corinth and the Kiel Canals. The Corinth Canal, opened 1893, shortening somewhat the route to the Black Sea, wholly within the territory of Greece, is subject to the exclusive jurisdiction. The Kiel Canal, opened 1896, serving similarly for the route to the Baltic Sea, is exclusively German.

Canals which connect great bodies of water, and are international in character, modify the course of the commerce of the world, and their status is therefore a matter of international concern.

The powers parties to the treaty of October 29, 1888, in regard to the Suez Canal, were Austria-Hungary, France, Germany, Great Britain, Italy, Netherlands, Russia, Spain, and Turkey. These states expressed the wish that they might establish "a definite system destined to guarantee at all times, and for all powers, the free use of the Suez Maritime Canal." Certain articles of the treaty particularly concern the international position of the Canal:

"Article I. The Suez Maritime Canal shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag.

"Consequently, the high contracting parties agree not in any way to interfere with the free use of the canal, in time of war as in time of peace.

"The canal shall never be subjected to the exercise of the right of blockade."

Article IV contracts to regard the three-mile limit, the limitation on the provisioning of vessels, and the twenty-four hour rule in regard to sailing of belligerent vessels in time of war.

The general result of the other clauses of the treaty is to give security for innocent passage of the canal by ships of any state at all times.²⁹

²⁹ For text of treaty see 3 Moore, § 369, p. 264.

While Great Britain originally signed the treaty under reservation "as to the application of these provisions, in so far as they may not be compatible with the transitory and exceptional condition of things actually existing in Egypt and may limit the freedom of action of their government during the period of the occupation of Egypt by

In 1850 the United States and Great Britain made what was known as the "Clayton-Bulwer Treaty." This treaty provided for the free navigation and neutralization of a canal between the Atlantic and Pacific Oceans by the way of Nicaragua. This treaty was the subject of much discussion,³⁰ and was finally superseded by the Hay-Pauncefote Treaty of November 18, 1901, between Great Britain and the United States, which provides for construction of a canal between the Atlantic and Pacific Oceans under the auspices of the United States by any route considered expedient, without, however, impairing the "general principle" of neutralization established in the treaty of 1857.³¹

the forces of Her Britannic Majesty," this reservation was practically waived by the treaty between France and Great Britain in regard to Morocco and Egypt of April 8, 1904:

"Art. VI. In order to insure the free passage of the Suez Canal, His Britannic Majesty's government declare that they adhere to the stipulations of the treaty of the 29th October, 1888, and that they agree to their being put in force. The free passage of the Canal being thus guaranteed, the execution of the last sentence of paragraph 1 as well as of paragraph 2 of article VIII of that treaty will remain in abeyance." Par. Papers, Treaty Series (1905), No. 6.

³⁰ 3 Moore, § 351, seq.

³¹ The clauses covering the provisions of the Hay-Pauncefote Treaty of November 18, 1901, in regard to a trans-isthmian canal are as follows:

"Article I. The high contracting parties agree that the present treaty shall supersede the afore-mentioned convention of the 19th April, 1850.

"Article II. It is agreed that the canal may be constructed under the auspices of the government of the United States, either directly at its own cost, or by gift or loan of money to individuals or corporations, or through subscription to or purchase of stock or shares, and that, subject to the provisions of the present treaty, the said government shall have and enjoy all the rights incident to such construction, as well as the exclusive right of providing for the regulation and management of the canal.

"Article III. The United States adopts, as the basis of the neutralization of such ship canal, the following rules, substantially as embodied in the Convention of Constantinople, signed the 28th October, 1888, for the free navigation of the Suez Canal, that is to say:

"1. The canal shall be free and open to the vessels of commerce and of war of all nations observing these rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or

A revolution occurred on the Isthmus of Panama early in November, 1903. The United States recognized the revolutionary as the *de facto* government on November 6, and a treaty with the new Republic of Panama was signed November 18, 1903.³² By this treaty, providing for the construction of a canal, the United States "guarantees and will maintain the in-

charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable.

"2. The canal shall never be blockaded, nor shall any right of war be exercised nor any act of hostility be committed within it. The United States, however, shall be at liberty to maintain such military police along the canal as may be necessary to protect it against lawlessness and disorder.

"3. Vessels of war of a belligerent shall not revictual nor take any stores in the canal except so far as may be strictly necessary; and the transit of such vessels through the canal shall be effected with the least possible delay in accordance with the regulations in force, and with only such intermission as may result from the necessities of the service.

"Prizes shall be in all respects subject to the same rules as vessels of war of the belligerents.

"4. No belligerent shall embark or disembark troops, munitions of war, or warlike materials in the canal, except in case of accidental hindrance of the transit, and in such case the transit shall be resumed with all possible dispatch.

"5. The provisions of this article shall apply to waters adjacent to the canal, within three marine miles of either end. Vessels of war of a belligerent shall not remain in such waters longer than twenty-four hours at any one time, except in case of distress, and in such case, shall depart as soon as possible, but a vessel of war of one belligerent shall not depart within twenty-four hours from the departure of a vessel of war of the other belligerent.

"6. The plant, establishments, buildings, and all work necessary to the construction, maintenance, and operation of the canal shall be deemed to be part thereof, for the purposes of this treaty, and in time of war, as in time of peace, shall enjoy complete immunity from attack or injury by belligerents, and from acts calculated to impair their usefulness as part of the canal.

"Article IV. It is agreed that no change of territorial sovereignty or of the international relations of the country or countries traversed by the before-mentioned canal shall affect the general principle of neutralization or the obligation of the high contracting parties under the present treaty."

³² For history since 1898, see Latané, *America as a World Power*, c. XII, *The Panama Canal*.

dependence of the Republic of Panama" (Art. I). "The Republic of Panama grants to the United States in perpetuity the use, occupation and control of a zone of land and land under water for the construction, maintenance, operation, sanitation and protection of said canal of the width of ten miles extending to the distance of five miles on each side of the center line of the route of the canal to be constructed; the said zone beginning in the Caribbean Sea three marine miles from mean low-water mark and extending to and across the Isthmus of Panama into the Pacific Ocean to a distance of three marine miles from mean low-water mark, with the proviso that the cities of Panama and Colon and the harbors adjacent to said cities, which are included within the boundaries of the zone above described, shall not be included within this grant" (Art. II). The United States also acquire similar rights over certain other waters, islands, etc., the right of eminent domain in the cities of Panama and Colon, as well as sanitary control and the general rights of control of the Canal Zone. The treaties thus far negotiated provide, therefore, for a trans-Isthmian canal under the control of the United States, with an international status "substantially as embodied in the convention" for the navigation of the Suez Canal.

Rivers.

The claim that river navigation should be free has received much support both in the earlier³³ and later writers;³⁴ but in later years practice has inclined toward regulation of navigation by conventional agreements.³⁵

The general rules are as follows:

- (a) The navigation of rivers wholly within the boundaries of one state is exclusively within the control of that state.
- (b) The navigation of boundary rivers is in the control of the states having jurisdiction over the river.
- (c) The navigation of rivers flowing through two or more states is, for such parts as are in each state, within the control of such state.

The above rules are modified by many treaties and by practice.

³³ Grotius, II, c. II, 12-14.

³⁴ Calvo, §§ 259, 290, 291.

³⁵ 2 Pradier-Fodéré, §§ 727-755.

There has been a tendency, particularly since the Congress of Vienna in 1815, to open the rivers which are the more important highways of international commerce to freedom of navigation. This Congress made certain arrangements for the free navigation of the Rhine, Neckar, Maine, Moselle, Meuse, and Scheldt.³⁶ Provisions like that of the treaty of peace between Great Britain and the United States in 1783, article VIII, "The navigation of the river Mississippi, from its source to the ocean, shall forever remain free and open to the subjects of Great Britain and the citizens of the United States," had often been negotiated between two or more states.³⁷ This provision for the navigation of the Mississippi was not included in the Treaty of Ghent between the two powers in 1814. Article XV of the Treaty of Paris of March 30, 1856, provided as follows:

"The act of the Congress of Vienna having established the principles intended to regulate the navigation of rivers which separate or traverse different states, the contracting powers stipulate among themselves that those principles shall in future be equally applied to the Danube and its mouths. They declare that this arrangement henceforth forms a part of the public law of Europe, and take it under their guarantee."

The navigation of the St. Lawrence river has been regulated by conventional agreement.

In nearly all cases the states through which the river flows, while granting freedom of navigation in the treaties, reserve the right to regulate the use of the river, in order that it may not be inconsistent with domestic law or harmful to the state.

Interior Waters.

Interior waters, such as lakes and seas, form a part of the maritime domain of the border state or states. If wholly within one state, that state, in absence of agreement, has exclusive regulation of the use of the waters. If surrounded by the land of two or more states, the use of the waters is considered common to the border states.

"There are other seas than the ocean whose open waters

³⁶ 1 Hertslet, p. 2, arts. CVIII-CXVII.

³⁷ Austria and Russia, as to Vistula, 1815; Border States, as to Elbe, 1821; Same, as to Weser, 1823; Same, as to Po, 1823.

constitute a free highway for navigation to the nations and people residing on their borders, and are not a free highway to other nations and people, except there be free access to those seas by open waters or by conventional arrangements.”³⁸

The domain, in absence of conventional agreement, is proportional to the extent of the shore line,³⁹ while jurisdiction for many purposes may be concurrent, extending over the whole water area.⁴⁰

FISHERIES.

41. (a) Fishing in the open sea is free to all, though sometimes regulated by treaties or domestic laws binding those subject to them.

(b) A state may control or forbid fishing within its maritime or fluvial domain.

(a) While fishing on the open sea is free to all, it has often been deemed advisable to make agreements for the good of all as to the manner, time, amount, etc., of fishing. In the time of Elizabeth the use of waters for fishing was assimilated to the use of waters for navigation.⁴¹ Claims to exclusive fishing rights beyond the marine league, in the open sea, have in general been abandoned, though not in waters within what may be classed as inclosed gulfs, bays, etc., even though the opening to the sea is more than ten miles in width.

The question of the rights of the United States over waters in the Bering Sea was raised in the Fur Seal Arbitration in 1893:

³⁸ United States v. Rogers, 150 U. S. 249, 14 Sup. Ct. 109, 37 L. Ed. 1071; Treaty of Washington, 1871, art. XXXIII.

³⁹ Weber v. Harbor Commissioners, 18 Wall. 57, 21 L. Ed. 798; Illinois Central Railroad v. Illinois, 146 U. S. 387, 13 Sup. Ct. 110, 36 L. Ed. 1018.

⁴⁰ In the case of United States v. Rogers it was declared that “the courts of the United States have jurisdiction, under section 5346 of the Revised Statutes [U. S. Comp. St. 1901, p. 3630], to try a person for an assault, with a dangerous weapon, committed on a vessel belonging to a citizen of the United States, when such vessel is in the Detroit river, out of the jurisdiction of any particular state, and within the territorial limits of the Dominion of Canada.” 150 U. S. 249, 14 Sup. Ct. 109, 37 L. Ed. 1071. See, also, 1 Moore, §§ 135-143.

⁴¹ 1 Phillimore, p. 266.

"5. Has the United States any right, and, if so, what right, of protection or property in the fur seals frequenting the islands of the United States in Bering Sea, when such seals are found outside the ordinary three-mile limit?"

The opinion of the arbitrators was: "As to the fifth of the said five points, we, the said Baron de Courcel, Lord Hannen, Sir John Thompson, Marquis Visconti Venosta, and Mr. Gregers Gram, being a majority of the said arbitrators, do decide and determine that the United States has not any right of protection or property in the fur seals frequenting the islands of the United States in Bering Sea, when such seals are found outside the ordinary three-mile limit."

The jurisdiction over the pearl fisheries off Ceylon to a considerable distance beyond the three-mile limit was based, according to the British contention in the Fur Seal Arbitration, upon "claim to the products of certain submerged portions of land which have been treated from time immemorial by the successive rulers of the island as subjects of property and jurisdiction."

The many questions in regard to fishing in the open sea have ordinarily arisen in consequence of treaty provisions existing among states. This is seen in such conventions as that of North Sea Fisheries of May 6, 1882; Convention Concerning the Regulation of the Liquor Traffic among the Fishermen in the North Sea, November 16, 1887; Convention of London in Regard to Fisheries around Farøe Islands, etc., June 24, 1901.⁴²

In general, however, fishing on the high sea is free to all. Citizens of a state are, of course, bound by treaties and local laws of that state, which may prohibit or limit to some extent their exercise of the general right.

(b) Within its maritime or fluvial domain a state may con-

⁴² On July 19, 1906, in the case of *Mortensen v. Peters*, High Court of Justiciary of Scotland, it was maintained that domestic legislation extended to the regulation of fishing in Moray Firth, even though the opening toward the sea might be more than ten miles wide. This decision has been criticised on various grounds. See "The Recent Controversy as to the British Jurisdiction over Foreign Fishermen More than Three Miles from Shore," C. N. Gregory, 1 *Amer. Pol. Sci. Rev.* p. 410.

trol fishing. A state may grant to other states rights in its coast fisheries, and these may become, as in the case of the Northeastern or Canadian Fisheries, fruitful sources of international differences.⁴³

VESSELS.

42. The jurisdiction over vessels depends:

- (a) On the character of the vessel, as public or private.
- (b) On place in which the vessel is, as in port, on the high seas.
- (c) On the nationality of the vessel.

Closely related to the exercise of maritime jurisdiction is the exercise of jurisdiction over the vessels which are upon the water. It is necessary that a vessel be under some jurisdiction, even on the high seas; for many of the acts which are prohibited on land may take place on a vessel at sea. A theft or assault on a vessel at sea would not be unlike a similar offense on land. Unless there were established rules for the exercise of jurisdiction, complications might arise if on a British vessel an American sailor should assault a French traveler.

(a) Public vessels are those engaged in service of the state and under command of government officers. As such they are under the direct government control, and for their acts the government is liable.

Private vessels are only indirectly under government control, and for their acts the government is only indirectly liable.

Certain vessels are regarded as semi-public when engaged in service which is of value to all states, as postal vessels and exploring expeditions. Provisions for the treatment of such vessels are usually made in treaties.

(b) A state has exclusive jurisdiction over its public and private vessels in all places outside the jurisdiction of a foreign state.⁴⁴

⁴³ 1 Moore, §§ 163-168. For Newfoundland Acts 1906 and *Modus Vivendi* October 6-8, 1906, see 1 A. J. I. Official Documents, pp. 22-31.

⁴⁴ *Wilson v. McNamee*, 102 U. S. 572, 26 L. Ed. 234; *United States v. Rodgers*, 150 U. S. 249, 14 Sup. Ct. 109, 37 L. Ed. 1071.

A public vessel within the jurisdiction of a foreign state is in general subject only to local port regulations. The exemption from local jurisdiction in a foreign port extends not merely to the ship itself, but to the boats, rafts, etc., belonging to the ship and engaged in its service.⁴⁵

Asylum on board public vessels in a foreign port is sometimes granted, though such action is less frequent than formerly. On unquestioned grounds of humanity it may be and is granted, as in less civilized regions to those fleeing from slavery, or to those who in time of political uprising flee to the vessel, pursued by irresponsible parties.⁴⁶ The commander of the vessel is in all cases responsible to his government for his action; and, if he refuses to release a refugee at the request of the local authorities, resort must be had to the ordinary diplomatic processes. The local state is at liberty to regard such action as an interference with its legitimate exercise of jurisdiction, and may even request the vessel to leave.⁴⁷

It is generally admitted that merchant vessels cannot grant asylum, and that passengers in transit, accused of committing crime in a state, are liable to local jurisdiction while within ports of that state.⁴⁸

⁴⁵ *The Santissima Trinidad*, 7 Wheat. 283, 5 L. Ed. 454.

⁴⁶ "The right of asylum for political or other refugees has no foundation in international law. In countries, however, where frequent insurrections occur, and constant instability of government exists, usage sanctions the granting of asylum; but, even in the waters of such countries, officers should refuse all applications for asylum, except when required by the interests of humanity in extreme or exceptional cases, such as the pursuit of a refugee by a mob. Officers must not directly nor indirectly invite refugees to accept asylum." United States Navy Regulations of 1905, No. 308.

⁴⁷ For discussion as to asylum to political refugees in Brazil, 1894, *Foreign Relations U. S.*, 1894, pp. 65 seq., 514 seq.

⁴⁸ "If it were generally understood that the masters of American merchantmen are to permit the orderly operation of the law in ports of call, as regards persons on board accused of crime committed in the country to which the port pertains, it is probable on the one hand that occasions of arrest would be less often invited by the act of the accused in taking passage with a view to securing supposed asylum, and on the other hand that the regular resort to justice would replace the reckless and offensive resort to arbitrary force against an unarmed ship, which, when threatened or committed, has in more than one instance constrained urgent remonstrance on the

Though a state may admit foreign merchant vessels to its ports, it does not thereby waive the right to exercise over these vessels such jurisdiction as it may deem expedient. Secretary Bayard in 1885 said:

"It may be safely affirmed that, when a merchant vessel of one country visits the ports of another for the purposes of trade, it owes temporary allegiance and is amenable to the jurisdiction of that country, and is subject to the laws which govern the port it visits so long as it remains, unless it is otherwise provided by treaty.

"Any exemption or immunity from local jurisdiction must be derived from the consent of that country."⁴⁹

In case of offenses committed on board a foreign vessel in a port, the French usage has steadily grown in favor. The French usage is, unless local interference is requested, to leave to the authorities of the state whose flag the merchant vessel flies action as to offenses which concern the discipline of the vessel itself and as to offenses which do not disturb the peace of the port.⁵⁰ Acts committed by or against parties who do not belong to the vessel, or acts which disturb the peace of the port, may be cognized by the local authorities. Article XIII of the Treaty between the United States and the German Empire, December 11, 1871, embodies these principles:

"Consuls general, consuls, vice consuls or consular agents shall have exclusive charge of the internal order of the merchant vessels of their nation, and shall have the exclusive power to take cognizance of and to determine differences of every kind which may arise, either at sea, or in port, between captains, officers and crews, and specially in reference to wages and the execution of mutual contracts. Neither any court or authority, shall, on any pretext, interfere in these differences except in cases where the differences on board ship are of a nature to disturb the peace and public order in port, or on

part of this government." Secretary Gresham to President of Pacific Mail Steamship Co., Dec. 30, 1893, Foreign Relations U. S. 1894, p. 297; 2 Moore, § 307.

⁴⁹ Foreign Relations U. S., 1885, p. 82.

⁵⁰ Bonfils, *De la Compétence de Tribunaux Français*, No. 326; XVI *Annuaire de l'Institut de Droit International*, p. 231.

shore, or when persons other than the officers and crew of the vessel, are parties to the disturbance.

"Except as aforesaid, the local authorities shall confine themselves to the rendering of efficient aid to the consuls, when they may ask it in order to arrest and hold all persons, whose names are borne on the ship's articles, and whom they may deem it necessary to detain. Those persons shall be arrested at the sole request of the consuls addressed in writing to the local authorities and supported by an official extract from the register of the ship or the list of the crew, and shall be held, during the whole time of their stay in the port, at the disposal of the consuls. Their release shall be granted only at the request of the consuls, made in writing.

"The expenses of the arrest and detention of those persons shall be paid by the consuls."

Similar provisions are contained in many other treaties.

The British Territorial Waters Jurisdiction Act of 1878, however, claims that vessels simply passing through British marginal waters are liable to British law.⁵¹

(c) The nationality of a vessel is usually determined by the flag of the vessel. In time of peace, the nationality of a public vessel is determined by its flag, or in exceptional cases by the word of the commander. The nationality of a private vessel is usually that of its flag; but, in case of question, the vessel must have papers which establish its claims. These papers vary for different states, but usually include registry, muster roll, description, certificate of ownership, license, etc.

AERIAL JURISDICTION.

43. It is now recognized that the jurisdiction of a state includes the right to exercise authority in the atmosphere above the state domain.

The use of the atmosphere as a medium of communication and as a highway for airships, etc., has led to the recognition of the rights and duties of states in the atmosphere above their domain.

⁵¹ St. 41 & 42 Vict. c. 73.

When the atmosphere was first used as a highway in time of war, those thus using it were threatened with exceptionally severe treatment, as during the Franco-Prussian war of 1870 Bismarck regarded those crossing territory occupied by the Prussians as liable to treatment as spies. Similarly the Russian commander in the Far East during the Russo-Japanese war in 1904 declared he would regard newspaper correspondents using wireless telegraph apparatus as spies. Both these claims were regarded as extreme, and protests were entered. It was not denied, however, that the state would have some measure of jurisdiction in such cases. It was admitted that the use of the atmosphere above belligerent territory might be forbidden to balloons, or that those making use of the atmosphere above belligerent territory might become liable to treatment as prisoners of war. It was also admitted that the use of wireless telegraph in time of war might be regulated within the area of hostilities, and that belligerents might be forbidden the use of wireless telegraph apparatus within neutral jurisdiction. The Hague Convention Respecting the Rights and Duties of Neutral Powers provides:

"Article III. Belligerents are likewise forbidden to:

"(a) Erect on the territory of a neutral power a wireless telegraphy station or other apparatus for the purpose of communicating with belligerent forces on land or sea;

"(b) Use any installation of this kind established by them before the war on the territory of a neutral power for purely military purposes, and which has not been opened for the service of public messages," though a neutral is not called upon to forbid the use of its own or regular private system within its territory.

In time of peace, also, it has been admitted that a state should exercise jurisdiction over its aërial domain. Numerous reports of national and international commissions have shown that this is necessary in order that systems of wireless telegraphy may not "be rendered absolutely useless by accident or by design."

In 1903 the states signing the protocol of the Preliminary Conference on Wireless Telegraphy at Berlin did not hesitate to assume the right of aërial jurisdiction, and the larger

conference in 1906, proceeding on the same basis, prescribed more detailed regulations for the use of the atmosphere for radio-telegraphic purposes.

The Institute of International Law, at its session in September, 1906, maintained the right of a state to make rules for the use of its atmospheric domain by wireless telegraph.⁵²

62 DISPOSITIONS PRÉLIMINAIRES.

Article Premier. L'air est libre. Les États n'ont sur lui, en temps de paix et en temps de guerre, que les droits nécessaires à leur conservation.

Art. 2. À défaut de dispositions spéciales, les règles applicables à la correspondance télégraphique ordinaire le sont à la correspondance télégraphique sans fil.

PREMIÈRE PARTIE.

État de Paix.

Art. 3. Chaque État a la faculté, dans la mesure nécessaire à sa sécurité, de s'opposer, au-dessus de son territoire et de ses eaux territoriales, et aussi haut qu'il sera utile, au passage d'ondes hertziennes, que celles-ci soient émises par un appareil d'État ou par un appareil privé placé à terre, à bord d'un navire ou d'un ballon.

Art. 4. Au cas d'interdiction de la correspondance par la télégraphie sans fil, le gouvernement devra aviser immédiatement les autres gouvernements de la défense qu'il édicte.

SECONDE PARTIE.

État de Guerre.

Art. 5. Les règles admises pour le temps de paix sont, en principe, applicables au temps de guerre.

Art. 6. Sur la haute mer, dans la zone qui correspond à la sphère d'action de leurs opérations militaires, les belligérants peuvent empêcher les émissions d'ondes, même par un sujet neutre.

Art. 7. Ne sont pas considérés comme espions de guerre mais doivent être traités comme prisonniers de guerre, s'ils sont capturés, les individus qui, malgré la défense du belligérant, se livrent à la transmission ou à la réception des dépêches par télégraphie sans fil entre les diverses parties d'une armée ou d'un territoire belligérant. Il doit en être autrement si la correspondance est faite sous de faux prétextes.

Les porteurs des dépêches transmises par la télégraphie sans fil sont assimilés à des espions lorsqu'ils emploient la dissimulation ou la ruse.

Les navires et les ballons neutres qui, par leurs communications avec l'ennemi, peuvent être considérés comme s'étant mis à son service, pourront être confisqués ainsi que leurs dépêches et leurs appareils. Les sujets, navires et ballons neutres, s'il n'est pas établi que leur correspondance était destinée à fournir à l'adversaire des ren-

The provision in the Constitution of the United States vesting in Congress the power to regulate commerce has already been held to extend to the regulation of the carriage of telegraphic messages in the case of *Western Union Telegraph Co. v. Texas*.⁵³ The regulation of the transmission of wireless telegraphic messages has in recent years often been shown to be most necessary, particularly for the preservation of life and property upon the sea.

The aërial jurisdiction is thus held to reside in the state having the jurisdiction over the land and water below.

The regulations in regard to the use of wireless telegraphy on the high seas have also shown a tendency on the part of states to assume a control of the atmosphere above the high seas similar to that assumed over the high seas in establishing other regulations generally advantageous.

The exact limits of aërial jurisdiction are not yet determined. The Institute of International Law in 1906 enunciated the principle, "The air is free," and limited the rights of the states in the air to such as were necessary to self-preservation, whether in peace or war. If this is interpreted in the strict sense, it would correspond to the rights of a state upon the high seas. It is evident, from the physical relationship of the atmosphere to the earth below, that the analogy does not hold in all respects. A ship, becoming disabled upon the high seas and sinking, might bring no risk to the life and property of the state nearest which it might at the time be sailing. A ship, becoming disabled in the air and sinking to the earth below, would bring danger to the life and property of the state

seignements relatifs à la conduite des hostilités, pourront être écartés de la zone d'opérations et leurs appareils saisis et séquestrés.

Art. 8. L'État neutre n'est pas obligé de s'opposer au passage au-dessus de son territoire d'ondes hertziennes destinées à un pays en guerre.

Art. 9. L'État neutre a le droit et le devoir de fermer ou de prendre sous son administration l'établissement d'un État belligérant qu'il avait autorisé à fonctionner sur son territoire.

Art. 10. Toute interdiction de communiquer par la télégraphie sans fil, formulée par les belligérants, doit être immédiatement notifiée par eux aux gouvernements neutres.

21 Annuaire de l'Institut, p. 327.

⁵³ 105 U. S. 460, 26 L. Ed. 1067.

above which it might at the time be passing. It is probable that for the control of aerial navigation somewhat different regulations may be necessary than for the regulation of wireless telegraphy, which the Institute of International Law had particularly under consideration in 1906.

It would certainly be difficult to maintain that, in a contiguous area not within the jurisdiction of any state, a state would have no right of jurisdiction, though an act within this area might bring to the state serious consequences. What these rights are may be inferred from analogy to rights of jurisdiction already accepted. Nys, after mentioning that the development of the principles of maritime jurisdiction follows the fundamental principles of land jurisdiction, says that, "to the extent that 'the conquest of the air' is made and 'aerial navigation' progresses, the principles of 'aerial law' will be derived from the fundamental principles of maritime law."⁵⁴ The extension of the principles of maritime law may not always be sufficient.⁵⁵ Certain writers, following this analogy, would limit the qualified jurisdiction of the air to the actual range of projectiles from the surface of the earth. There is to be remembered in this proposition that, while the place of departure of the projectile from the earth may be known, unless some special form of projectile is used, its return to the earth's surface may be dangerous, and also that the projectile sent from the earth's surface is acting against the force of gravity, while one dropped from a distance above is acting with the force of gravity. Some would deny the free use of the air within 5,000 feet of the earth's surface to the public ships of foreign states.⁵⁶ Others would admit free use in time of peace, subject to police regulations, but extend the restraint in time of war.⁵⁷

⁵⁴ 1 Nys, *Le droit international*, p. 524.

⁵⁵ Meurer, *Luftschiffartsrecht*, p. 5.

⁵⁶ Fauchille, 19 *Annuaire de l'Institut de Droit International*, p. 34.

⁵⁷ Merignhac, *Lois et Coutumes de la Guerre sur Terre*, p. 196; Scholz, *Drahtlose Telegraphie und Neutralität*, p. 19.

JURISDICTION OVER PERSONS—NATIONALS.**44. Nationals are persons who owe allegiance to a state and are entitled to its protection.**

In the discussions of the jurisdiction over persons, the words "citizen," "subject," "person within the jurisdiction of a state," have been used in so many different senses that in recent years the word "national" has been introduced as the term to designate those who owe allegiance to and are entitled to the protection of a given state. The conditions requisite for citizenship are of significance to other branches of public law, rather than to international law.

Over its nationals within its own jurisdiction a state has full authority. This jurisdiction extends, not merely to its domain, but to the ships under its flag on the high seas.

Over its nationals within foreign jurisdiction a state has a qualified jurisdiction, varying according to circumstances and according to the law and practice of the foreign state.

Over its nationals when in a foreign port on vessels flying its flag, for acts beginning and ending on board the vessel, or for acts which do not take effect outside the vessel, a state has, in general, jurisdiction.

Certain persons are by practice exempt from foreign jurisdiction, and under the authority of the state to which they owe allegiance, as in case of a diplomat and the persons connected with the suite of a diplomat.

States sometimes claim authority over their nationals sojourning within a foreign jurisdiction. Claim to authority to call home nationals who may be abroad in time of war has been made from time to time. Claim to authority to punish nationals for crimes committed abroad has been admitted.

Many phases of the jurisdiction over nationals belong to the field of "Conflict of Laws," or "International Private Law." Other phases of the subject will be treated in Part III, "Inter-course of States," and under appropriate sections elsewhere.

ACQUISITION OF NATIONALITY.

45. Nationality may be determined by place of birth, *jus soli*; by the nationality of the parents, *jus sanguinis*; or by some form of naturalization.⁵⁸

While nationality is not determined by international law, its determination is often a subject of international negotiation; indeed, few subjects have given rise to so many diplomatic controversies. The laws determining nationality in different states are unlike, and sometimes there are different methods of determination within the same state.⁵⁹

The United States laws provide that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."⁶⁰ Here the *jus soli* is followed. Great Britain and South American states generally follow *jus soli*.

The United States law also provides that "all children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."⁶¹ Here the *jus sanguinis* is followed; but the father must be a citizen of the United States at the time of the birth of the child, and must have resided in the United States. By the act of March 2, 1907, children, born of American parents resident abroad, who continue to reside abroad, in order to receive the protection of the United States must "upon reaching the age of eighteen years record at an American consulate their intention to become residents and remain citizens of the United States and shall be further required to take the oath

⁵⁸ For full treatment of United States practice see Van Dyne, *Naturalization in the United States*.

⁵⁹ By Act June 29, 1906, the United States established a Bureau of Naturalization in the Department of Commerce and Labor. 34 Stat. 596 (U. S. Comp. St. Supp. 1909, p. 477).

⁶⁰ Const. U. S. Amend. 14. See, also, *Foreign Relations U. S.* 1901, p. 303; Great Britain, Act May 12, 1870, art. 4.

⁶¹ Rev. St. § 1993 (U. S. Comp. St. 1901, p. 1268).

of allegiance to the United States upon attaining their majority." The race, residence, or status of the mother does not affect the status of the child, provided only the father is a citizen at the time of the child's birth.⁶²

Foundlings are regarded as nationals of the state in which they are found. An illegitimate child, born within the state of which the mother is a subject, is a national of that state. It has been held that an illegitimate child born abroad to an American woman is not entitled to United States citizenship.⁶³

As some other states follow the *jus soli*, and some the *jus sanguinis*, and some, like the United States, follow both, there has grown up the practice of allowing the child born abroad to elect his allegiance upon attaining his majority. Certain states, however, require in case of renunciation, not merely that citizenship be renounced by the child, but also that the renunciation be accepted by the state of which the parents are nationals.⁶⁴

Naturalization is the act conferring on a foreigner the status of a national.

Naturalization may be (a) by general law; (b) by marriage; (c) through act of parent; (d) through general transfer of allegiance by treaty of cession, purchase, etc.; (e) through the transfer of allegiance by conquest; (f) in consequence of certain special service, etc.; (g) by admission of new territory into a state; (h) by special act of legislation; (i) by election.

(a) The laws in regard to the acquisition of nationality vary greatly in different states. In general, they require a renunciation of allegiance to the parent state and an oath of allegiance to the adopted state.⁶⁵

⁶² Foreign Relations U. S. 1903, p. 45.

⁶³ *Guyer v. Smith*, 22 Md. 239, 85 Am. Dec. 650.

⁶⁴ Swiss Law, July 3, 1876. The *jus sanguinis* is also followed by Austria, Civil Code, art. 23; Hungary, Law Dec. 24, 1879; Germany, Law June 1, 1870; Sweden, Law Feb. 5, 1858.

⁶⁵ In the United States the act of Congress of June 29, 1906, provides in section 4:

"That an alien may be admitted to become a citizen of the United States in the following manner and not otherwise:

"First. He shall declare on oath before the clerk of any court

(b) In general, a woman by marriage acquires the nationality of her husband, though this does not follow unless she

authorized by this act to naturalize aliens, or his authorized deputy, in the district in which such alien resides, two years at least prior to his admission, and after he has reached the age of eighteen years, that it is bona fide his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly, by name, to the prince, potentate, state, or sovereignty of which the alien may be at the time a citizen or subject. * * *

"Second. Not less than two years nor more than seven years after he has made such declaration of intention he shall make and file, in duplicate, a petition in writing. * * * The petition shall set forth that he is not a disbeliever in or opposed to organized government, or a member of or affiliated with any organization or body of persons teaching disbelief in or opposed to organized government, a polygamist or believer in the practice of polygamy, and that it is his intention to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince.

* * *

"Third. He shall, before he is admitted to citizenship, declare on oath in open court that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty of which he was before a citizen or subject; that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same.

"Fourth. It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he has resided continuously within the United States five years at least, and within the state or territory where such court is at the time held one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. In addition to the oath of the applicant, the testimony of at least two witnesses, citizens of the United States, as to the facts of residence, moral character, and attachment to the principles of the Constitution shall be required, and the name, place of residence, and occupation of each witness shall be set forth in the record.

"Fifth. In case the alien applying to be admitted to citizenship has borne any hereditary title, or has been of any of the orders of nobility in the kingdom or state from which he came, he shall, in addition to the above requisites, make an express renunciation of his title or

would in her own right be entitled to obtain such nationality.⁶⁶ If a United States citizen should marry a Chinese woman, the Chinese woman would not thereby acquire United States citizenship, though their children would follow the nationality of the father.⁶⁷ In some states it is made easier for a foreigner who has married a native woman to acquire the citizenship of his wife.⁶⁸

By the act of March 2, 1907 (U. S. Comp. St. Supp. 1909, p. 439), an American woman who marries a foreigner takes his nationality. On the termination of the marital relation, if abroad, she may by registering before a United States consul within one year resume her American citizenship, or on returning to reside, or if residing in the United States, American citizenship is resumed by continuing to reside therein.

By the same act a foreign woman who acquires American nationality by marriage to an American citizen retains the same after termination of the marital relation, if she continues to reside in the United States and does not formally renounce the same, or if residing abroad she may retain United States

order of nobility in the court to which his application is made, and his renunciation shall be recorded in the court.

"Sixth. When any alien who has declared his intention to become a citizen of the United States dies before he is actually naturalized the widow and minor children of such alien may, by complying with the other provisions of this act, be naturalized without making any declaration of intention."

34 Stat. 596 (U. S. Comp. St. Supp. 1909, p. 478).

⁶⁶ "Any foreign woman who acquires American citizenship by marriage to an American shall be assumed to retain the same after the termination of the marital relation if she continue to reside in the United States, unless she makes formal renunciation thereof before a court having jurisdiction to naturalize aliens, or if she resides abroad she may retain her citizenship by registering as such before a United States consul within one year after the termination of such marital relation." Act March 2, 1907, § 4 (U. S. Comp. St. Supp. 1909, p. 439). Whenever a foreign woman marries an American and is abroad when the marital relation is terminated, she must register as an American citizen before an American consul within one year.

⁶⁷ Rev. St. § 1994 (U. S. Comp. St. 1901, p. 1268): "Any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen."

⁶⁸ Belgium, Law of Aug. 6, 1881; France, Law of June 26, 1889.

citizenship by registering before an American consul within one year.⁶⁹

(c) Naturalization of the parents ordinarily confers upon minor children the nationality acquired by the parents, though it may be under conditions. The United States law contains a clause restricting such acquisition of nationality to children "under twenty-one years of age at the time of naturalization of their parents" and "dwelling in the United States."⁷⁰ The

⁶⁹ British Naturalization Act, 1870, provides in section 10 for readmission:

"National Status of Married Women and Infant Children.

"10. The following enactments shall be made with respect to the national status of women and children:

"(1) A married woman shall be deemed to be a subject of the state of which her husband is for the time being a subject.

"(2) A widow being a natural-born British subject, who has become an alien by or in consequence of her marriage, shall be deemed to be a statutory alien, and may as such at any time during widowhood obtain a certificate of readmission to British nationality in manner provided by this act.

"(3) Where the father being a British subject, or the mother being a British subject and a widow, becomes an alien in pursuance of this act, every child of such father or mother who during infancy has become resident in the country where the father or mother is naturalized, and has, according to the laws of such country, become naturalized therein, shall be deemed to be a subject of the state of which the father or mother has become a subject, and not a British subject.

"(4) Where the father, or the mother being a widow, has obtained a certificate of readmission to British nationality, every child of such father or mother who during infancy has become resident in the British dominions with such father or mother, shall be deemed to have resumed the position of a British subject to all intents.

"(5) Where the father, or the mother being a widow, has obtained a certificate of naturalization in the United Kingdom, every child of such father or mother who during infancy has become resident with such father or mother in any part of the United Kingdom, shall be deemed to be a naturalized British subject"

⁷⁰ Rev. St. § 2172 (U. S. Comp. St. 1901, p. 1334): "The children of persons who have been duly naturalized under any law of the United States, or who previous to the passing of any law on that subject, by the government of the United States, * * * being under the age of twenty-one years at the time of the naturalization of their

words "dwelling in the United States" do not necessarily mean dwelling in the United States at the time of the parent's naturalization, but "either at the time of the father's naturalization or afterwards during the child's minority."⁷¹ The doubt as to the operation of certain clauses of sections of the law mentioned above was removed by section 5 of the act of March 2, 1907 (U. S. Comp. St. Supp. 1909, p. 410), which provides: "That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the parent: Provided, that such naturalization or resumption takes place during the minority of such child: And provided further, that the citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States."

(d) Transfer of territory by treaty usually transfers the political allegiance of the inhabitants of the territory. Inhabitants of a territory thus transferred are often allowed a reasonable time in which to withdraw, if they do not wish to accept the nationality of the new jurisdiction. Later treaties usually make provision for the transfer of nationality.⁷² The same is true of some of the earlier treaties, as in the treaty of Utrecht of 1713. Treaties transferring territory by exchange, sale, voluntary cession, cession as a result of war, etc., ordi-

parents, shall, if dwelling in the United States, be considered as citizens thereof."

⁷¹ Foreign Relations U. S. 1900, p. 527.

The American position in regard to minor children of a naturalized alien is reviewed in *Zaratarian v. Billings*, 204 U. S. 170, 27 Sup. Ct. 182, 51 L. Ed. 428. See, also, 3 Moore, § 413, particularly the Case of Heisinger.

⁷² Article III of the treaty ceding Louisiana to the United States in 1803 provides: "The inhabitants of the ceded territory shall be incorporated in the Union of the United States and admitted as soon as possible according to the principles of the federal Constitution to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the mean time they shall be maintained and protected in the free enjoyment of their liberty, property and the religion which they profess."

The treaty ceding Alaska to the United States allowed three years for the inhabitants to determine their allegiance. Article III, Treaty March 30, 1867.

narily contain specific clauses upon the transfer of nationality.⁷³ The transfer of nationality does not imply the grant of the right to vote or other rights which may be reserved to citizens in the narrower sense, as is formally agreed in the treaty terminating the Spanish-American War of 1898.⁷⁴

⁷³ The treaty of peace between the United States and Mexico in 1848 (treaty of Guadalupe Hidalgo) provided:

"Article VIII. Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican Republic, retaining the property which they possess in the said territories, or disposing thereof and removing the proceeds wherever they please; without their being subjected, on this account, to any contribution, tax or charge whatever.

"Those who shall prefer to remain in the said territories, may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But, they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty; and those who shall remain in the said territories, after the expiration of that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States.

"In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it, guarantees equally ample as if the same belonged to citizens of the United States.

"Article IX. The Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican Republic, conformably with what is stipulated in the preceding article, shall be incorporated into the Union of the United States and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States according to the principles of the Constitution; and in the mean time shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction."

These provisions were reaffirmed in the Gadsden Purchase Treaty of 1853, article V.

⁷⁴ "Article IX. Spanish subjects, natives of the Peninsula, residing in the territory over which Spain by the present treaty relinquishes or cedes her sovereignty, may remain in such territory or may remove therefrom, retaining in either event all their rights of property,

(e) Lacking treaty or other agreement, the inhabitants of territory acquired by conquest are regarded as of the nationality of the conquering state. The conquering state may determine the status of the inhabitants of the conquered territory. It is evident that this would be necessary, if the former government should be entirely overthrown as a result of the war, or if the former government should refuse to make any agreement in regard to the transfer.⁷⁵

(f) The acquisition of nationality is frequently made easier for foreigners who have rendered military, naval, or other service to a state. The United States laws permit an alien of legal age who has rendered honorable military service to the United States to become a citizen after one year of residence.⁷⁶ Previous declaration is not required of aliens who have honorably served five years in the Navy or Marine Corps.⁷⁷ Provision is made for the admission of aliens serving as merchant seamen three years after declaration of intention, instead of five.⁷⁸

(g) Territory previously outside the jurisdiction of any recognized state may be taken within the jurisdiction of a state. The inhabitants of such territory are generally entitled to the protection of and owe allegiance to the state within which

including the right to sell or dispose of such property or of its proceeds; and they shall also have the right to carry on their industry, commerce and professions, being subject in respect thereof to such laws as are applicable to other foreigners. In case they remain in the territory they may preserve their allegiance to the crown of Spain by making, before a court of record, within a year from the date of the exchange of ratifications of this treaty, a declaration of their decision to preserve such allegiance; in default of which declaration they shall be held to have renounced it and to have adopted the nationality of the territory in which they may reside.

"The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress."

See, also, the *Insular Decisions*, 182 U. S. 1-391, 21 Sup. Ct. 742, 743, 762, 770, 827, 45 L. Ed. 1041, 1065, 1074, 1086, 1088.

⁷⁵ *Downes v. Bidwell*, 182 U. S. 300, 21 Sup. Ct. 770, 45 L. Ed. 1088.

⁷⁶ Rev. St. § 2166 (U. S. Comp. St. 1901, p. 1331).

⁷⁷ 28 Stat. 124, c. 165.

⁷⁸ Rev. St. § 2174 (U. S. Comp. St. 1901, p. 1334).

they may thus come. This has been recognized in varying degrees in the protectorates established in Africa.⁷⁹

Territory which forms a part or the whole of a political unity may be admitted as a part of an existing state. Provision may be made in such case for the granting of the nationality of the receiving state to the inhabitants, even though the rights previously existing are in large measure retained. By the act of Congress of April 30, 1900, "providing a government for the territory of Hawaii," annexed to the United States by a joint resolution of July 7, 1898, it was provided that persons who were citizens of the Republic of Hawaii on August 12, 1898, were "citizens of the United States and citizens of the territory of Hawaii," and also that all citizens of the United States resident in the Hawaiian Islands August 12, 1898, and "all citizens of the United States who shall hereafter reside in the territory of Hawaii for one year, shall be citizens of the territory of Hawaii."⁸⁰

(h) Naturalization of individuals of groups may be by special act of legislation. Mrs. Sartoris was in 1898 admitted to United States citizenship by joint resolution of Congress.⁸¹ Tribes or larger groups of Indians have also been admitted to United States citizenship by special act.⁸² Many treaties for the reciprocal acknowledgment of naturalization were agreed upon about 1870.⁸³

⁷⁹ British South Africa Order in Council, 1891.

⁸⁰ 31 Stat. 141. See case of status of Chinaman born in Hawaiian Islands, Foreign Relations U. S. 1905, p. 735.

⁸¹ "Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, that Nellie Grant Sartoris, daughter of General Ulysses S. Grant, be, and she is hereby, on her own application, unconditionally readmitted to the character and privileges of a citizen of the United States, in accordance with the provisions of article third of the convention relative to naturalization between the United States and Great Britain concluded May thirteenth, eighteen hundred and seventy." 30 Stat. 1496.

⁸² 31 Stat. 1447.

⁸³ The Treaty of September 20, 1870, between the United States and Austria-Hungary provides:

"Article I. Citizens of the Austro-Hungarian monarchy who have resided in the United States of America uninterruptedly at least five years, and during such residence have become naturalized citizens of

(i) By *jus sanguinis*, followed by the United States, the child of an American father, though born abroad, ordinarily would acquire his father's nationality. Other states follow the same rule. Certain states, including the United States, also follow the *jus soli*, by which children born within the state acquire the nationality of the place of birth. There might, therefore, be a conflict as to allegiance. To obviate this it has become customary to allow the child born abroad to elect, on arriving at majority, whether he will assume the nationality of the place of birth or of his parentage.

EXPATRIATION.

46. Expatriation is the renunciation or abandonment of nationality.

The doctrine of perpetual or indelible allegiance has been maintained by many states. There was much difference of opinion in the United States⁸⁴ in regard to the right of expatriation, till by an act of July 27, 1868, restrictions upon the right of expatriation were "declared inconsistent with the fundamental principles of this government." Great Britain had for many years particularly maintained the doctrine of inalienable allegiance. This was distinctly renounced in 1870.⁸⁵

It is now recognized that citizenship may be forfeited by naturalization in a foreign state, by marriage to a foreigner in case of a woman, by entering the military service of a foreign state, by certain other service involving the taking of an oath of allegiance, by desertion from the army or navy, by long-continued residence abroad, or, in case of naturalized citizens, by residence abroad for a shorter period. Not all states are agreed upon these grounds of expatriation or forfeiture of citizenship. The United States has maintained that service in a foreign army does not necessarily forfeit citizenship. The Netherlands law holds a citizen expatriated if he enters for-

the United States shall be held by the government of Austria and Hungary to be American citizens, and shall be treated as such."

⁸⁴ 3 Moore, § 431, ff.; Moore, *American Diplomacy*, c. VII.

⁸⁵ Act Concerning Aliens and British Subjects, May 12, 1870 (St. 33 & 34 Vict. 105, c. 14).

foreign military service without permission. Some states maintain that residence abroad for a definite period forfeits citizenship; others require proof of intention to remain. German law prescribes that ten years' residence abroad may forfeit German nationality and possibly render a German *heimatlos*. The United States has frequently demanded proof of *animus manendi*.

There have been many treaties in regard to expatriation. A common provision of such treaties is to prescribe for the mutual recognition of naturalization as a means terminating prior citizenship. Citizenship based on naturalization may, however, lapse through residence abroad. The law of the United States of March 2, 1907,⁸⁶ provides in general that two years of residence in the foreign state from which he came, or five years of residence in any other foreign state, may expatriate a naturalized citizen.⁸⁷

PROTECTION OF NATIONALS.

47. (a) A state usually extends as full protection as possible to its native nationals in foreign states.

(b) A like protection is extended to its naturalized nationals in states other than those of their previous allegiance.

(c) A degree of protection is extended to those who through taking steps toward obtaining its citizenship have an inchoate right of nationality in a state, even though the new citizenship is not yet granted.

(a) While a state usually extends as full protection as possible to its native nationals, this protection may be conditioned

⁸⁶ Act March 2, 1907, 34 Stat. 1228 (U. S. Comp. St. Supp. 1909, p. 438). See, also, Van Dyne, *Naturalization in a Foreign State*, c. V.

⁸⁷ "When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: Provided, however, that such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: And provided also, that no American citizen shall be allowed to expatriate himself when this country is at war." 34 Stat. 1228 (U. S. Comp. St. Supp. 1909, p. 438).

upon the acts of the nationals themselves. The limits of protection of native nationals abroad depend upon the laws of the foreign state and upon treaty relations.

The rights of a national of one state in another state are usually specified in treaty agreement. Article II of the Treaty of July 3, 1902, between the United States and Spain provides that:

"There shall be a full, entire and reciprocal liberty of commerce and navigation between the citizens and subjects of the two high contracting parties, who shall have reciprocally the right, on conforming to the laws of the country, to enter, travel and reside in all parts of their respective territories, saving always the right of expulsion which each government reserves to itself, and they shall enjoy in this respect, for the protection of their persons and their property, the same treatment and the same rights as the citizens or subjects of the country or the citizens or subjects of the most favored nation.

"They can freely exercise their industry or their business, as well wholesale as retail, without being subjected as to their persons or their property, to any taxes, general or local, imposts or conditions whatsoever, other or more onerous than those which are imposed or may be imposed upon the citizens or subjects of the country or the citizens or subjects of the most favored nation.

"It is, however, understood that these provisions are not intended to annul or prevent, or constitute any exception from the laws, ordinances and special regulations respecting taxation, commerce, health, police, and public security, in force or hereafter made in the respective countries and applying to foreigners in general."

Nationals of a foreign state cannot claim more privileges than the subjects of the state in which they are for the time. As the foreign state has relations only with the national government, the national government cannot disclaim ordinary responsibility because its control of local divisions is of a restricted character. Instances have arisen in the United States in which the jurisdiction of the local states over aliens has given rise to complications in consequence of conflict with the national jurisdiction. Several cases of lynching have taken

place in certain states. In some instances those guilty of participation have not been punished, owing to the impossibility of enforcing the penalties through the local courts, which have jurisdiction. Mr. Hay, Secretary of State of the United States, in a letter to Baron Fava, the Ambassador of Italy, in regard to the lynching of certain Italians in Tallulah, Louisiana, in July, 1899, said on June 12, 1900:

"Excellency: I have the honor to acknowledge the receipt of your excellency's esteemed favor of May 6 in relation to the cruel lynching at Tallulah.

"In answer to your inquiry as to 'what measures the federal government intends to take in order to settle this unfortunate matter,' and to the assurance of your faith in the efficient action of the Department for the prevention in future of any repetition of such atrocious outrages, and for the application of remedial measures to the failure on the part of the Louisiana authorities to do justice, it should hardly seem necessary to testify to your excellency the unqualified condemnation with which the government of the United States views all such acts of lawless violence, whether committed against the subjects of other States residing in the United States or against its own citizens.

"Your excellency is advised of the dual nature of our government, and of the defect in the federal laws, which the President has sought, so far as lies in his power, to have remedied, and of the prompt and energetic measures adopted by the Department of State with a view to the punishment, by the only competent authorities, of the authors of the crime under discussion.

"It having been shown that Italian subjects were slain by said lynching, and that there has been a failure on the part of the only competent authorities to indict or bring the guilty parties to trial in any form, the President feels that a case has been established that should be submitted to the consideration of Congress, with a view to the relief of the families of Italian subjects who lost their lives by lawless violence, which will accordingly be done on the reassembling of Congress in December next."⁸⁸

⁸⁸ Foreign Relations U. S. 1900, p. 722.

Presidents of the United States have repeatedly recommended that legislation be passed conferring upon the federal courts jurisdiction in cases involving the treaty rights of aliens.

There have been several cases of violence against Italians for which the national government has paid indemnity.⁸⁹ The indemnity for the lynching in New Orleans in 1890 amounted to nearly \$25,000.

By an act of Congress of March 3, 1901, it was voted:

"To pay, out of humane consideration, without reference to the question of liability therefor, to the Italian government as full indemnity to the heirs of Joseph Defatta and John Cyrano, Italian citizens who were lynched at Tallulah, Louisiana, on July twentieth, eighteen hundred and ninety-nine, four thousand dollars."⁹⁰

The United States has thus in fact recognized its responsibility in many cases. The correspondence with foreign states on this subject covers many pages of the United States Foreign Relations since 1891, and receives considerable attention in the messages of the Presidents.

Over its nationals outside the jurisdiction of any state the state exercises full jurisdiction and protection as on its vessels on the high sea. A large degree of protection is also often extended to nationals in dependent areas, even when these are not incorporated into the state.⁹¹ When a native national by residence abroad changes his domicile⁹² to the foreign state, he cannot as of right claim protection from his native state. The rights and obligations of citizenship are naturally correlative. Long residence abroad and identification of interests with those of the foreign state may be sufficient evidence of intent to acquire a foreign domicile to warrant the withdrawal of national protection.

⁸⁹ Id. 1891, pp. 665-713; 1895, II, pp. 938-954; 1896.

⁹⁰ 31 Stat. 1010, c. 831.

⁹¹ Hall, *Foreign Jurisdiction of the British Crown*, c. 3.

⁹² Domicile by the Roman law was "the place from which a person going was on a journey and to which returning he was at his journey's end"—"*unde cum profectus est perigrinari jam videtur, quo si rediit peregrinari jam destitit.*"

Nationals of one state, domiciled in a foreign state which is at war, are liable to the consequences of the war.

(b) Naturalized nationals are entitled to the same degree of protection as natives elsewhere than in states of their prior allegiance. In states of their prior allegiance their status will be dependent upon the local law. If obligations to the state of their prior allegiance or liabilities rested upon a naturalized national before his naturalization, it is generally maintained that such obligation or liability revives on his return to the state of his prior allegiance. Some states hold that only those obligations and liabilities incurred before emigration revive.⁹³

(c) When a national of one state declares his intention to become a citizen of another state and to renounce his allegiance to his former sovereign, he acquires an inchoate nationality in the state of his choice. This declaration, called the "declara-

⁹³ "But a naturalized American of German birth is liable to trial and punishment upon return to Germany for an offense against German law committed before emigration, saving always the limitations of the laws of Germany. If he emigrated after he was enrolled as a recruit in the standing army; if he emigrated while in service, or while on leave of absence for a limited time; if, having an unlimited leave, or being in the reserve, he emigrated after receiving a call into service, or after a public proclamation requiring his appearance, or after war broke out—he is liable to trial and punishment on return." Liability to military service in Germany extends from the completion of the seventeenth year of age to the forty-fifth year. *Foreign Relations U. S. 1901*, p. 161.

See same volume for Austria-Hungary, p. 7; Belgium, p. 16; Denmark, p. 139; France, 153; Germany, 160; Greece, 247; Italy, 282; Netherlands, 418; Persia, 424; Portugal, 439; Roumania, 441; Russia, 453; Servia, 455; Sweden and Norway, 486; Switzerland, 499; Turkey, 515.

"The Turkish government denies the right of a Turk to become a citizen of any other country without the authority of the Turkish government. His naturalization is therefore regarded by Turkey as void with reference to himself and his children, and he is forbidden to return to Turkey.

"The consent of the Turkish government to the naturalization in another country of a former Turk is given only upon condition that the applicant shall stipulate either never to return, or, returning, to regard himself as a Turkish subject. Therefore, if a naturalized American citizen of Turkish origin returns to Turkey, he may expect arrest and imprisonment or expulsion."

tion of intention" in the United States,⁹⁴ does not confer upon the declarant the rights of citizenship, and until naturalization is completed he remains an alien. It is customary for a state to extend a degree of protection to those who have declared their intention to acquire its nationality. Such protection will ordinarily only be afforded to the declarant when outside the jurisdiction of the state which he proposes to renounce.⁹⁵

One of the most widely discussed cases of protection arose in 1853. Martin Koszta, a Hungarian, who had participated in the Revolution of 1848-49, fled to Turkey, was imprisoned,

94 "Declaration of Intention.

"(Invalid for all purposes seven years after the date hereof.)

.....—SS.:

"I,, aged years, occupation, do declare on oath (affirm) that my personal description is: Color, complexion, height, weight, color of hair, color of eyes, other visible distinctive marks; I was born in on the day of, Anno Domini; I now reside at; I emigrated to the United States of America from on the vessel; my last foreign residence was It is my bona fide intention to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to, of which I am now a citizen (subject); I arrived at the (port) of, in the state (territory or district) of, on or about the day of, Anno Domini; I am not an anarchist; I am not a polygamist, nor a believer in the practice of polygamy; and it is my intention in good faith to become a citizen of the United States of America and to permanently reside therein. So help me God.

"(Original signature of declarant)

"Subscribed and sworn to (affirmed) before me this day of, Anno Domini

"[L. S.]

"(Official character of attestor.)"

⁹⁵ Act March 2, 1907 (U. S. Comp. St. 1901, p. 438) provided: "That the Secretary of State shall be authorized in his discretion to issue passports to persons not citizens of the United States as follows: Where any person has made a declaration of intention to become such a citizen as provided by law, and has resided in the United States for three years, a passport may be issued to him entitling him to the protection of the government in any foreign country: Provided, that such passport shall not be valid for more than six months and shall not be renewed, and that such passport shall not entitle the holder to the protection of this government in the country of which he was a citizen prior to making such declaration of intention."

and released on condition that he would leave that state. Koszta came to the United States, declared his intention to become a citizen July 31, 1852, and returned to Turkey in 1853, as he alleged, on "private business of a temporary character." The American representatives in Turkey furnished him with "a *tezkerah*—a kind of passport or letter of safe-conduct." While in Smyrna he was thrown into the sea. He was picked up by a crew from the Austrian warship *Iluzzar*, taken on board the ship, and confined in irons. The American representatives requested Koszta's release, which was not granted. On arrival of an American warship in the harbor, Koszta's release was demanded, with an intimation that force would be used. Koszta was then delivered "into the custody of the French consul general, to be kept by him until the United States and Austria should agree as to the manner of disposing of him." Koszta was allowed to return to the United States, though Austria maintained her right to proceed against him if he should again return to Turkey. After mentioning that Koszta had by declaration manifested the intention of making the United States his permanent abode, Secretary Marcy says: "The establishment of his domicile here invested him with the national character of this country, and with that character he acquired the right to claim protection from the United States, and they had the right to extend it to him as long as that character continued. * * * This right to protect persons having a domicile, though not native-born or naturalized citizens, rests on the firm foundation of justice, and the claim to be protected is earned by considerations which the protecting power is not at liberty to disregard."⁹⁶

⁹⁶ This case is stated quite fully in 3 Moore, §§ 490, 491. The position taken by Secretary Marcy has been regarded as carrying the right to protection farther than may be generally expedient. Secretary Olney, in a letter to the Minister of China, Mr. Denby, in 1896, said: "The somewhat extreme position taken by Mr. Marcy in the Koszta case, that the declarant is followed, during sojourn in a third country, by the protection of this government, has since been necessarily regarded as applying particularly to the peculiar circumstances in which it originated, and to relate only to the protection of such a declarant in a third country against arbitrary seizure by the government of the country of his origin." *Foreign Relations U. S.* 1896, p. 92.

See, also, case of *Burnato*, 3 Moore, p. 847.

The United States by law of 1907 allows the Secretary of State in his discretion to issue a passport to a person not a citizen of the United States, provided he has declared his intention to become such and has resided in the United States for three years. Such passports are not valid for more than six months, nor in the state of prior allegiance, and cannot be renewed.⁹⁷

ALIENS.

48. In general, a state has the right to prohibit or condition the entrance and sojourn of aliens within its borders.

(a) The right to exclude aliens was one generally recognized and observed in early times. Some states now make the entrance of any alien difficult. Other states exclude certain classes. The United States, by the treaty of November 17, 1880, excludes Chinese laborers.⁹⁸ A state may also exclude

⁹⁷ 34 Stat. 1228 (U. S. Comp. St. Supp. 1909, p. 438).

⁹⁸ 22 Stat. 826.

"Article I. Whenever in the opinion of the government of the United States, the coming of Chinese laborers to the United States, or their residence therein, affects or threatens to affect the interests of that country, or to endanger the good order of the said country or of any locality within the territory thereof, the government of China agrees that the government of the United States may regulate, limit, or suspend such coming or residence, but may not absolutely prohibit it. The limitation or suspension shall be reasonable and shall apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitations. Legislation taken in regard to Chinese laborers will be of such a character only as is necessary to enforce the regulations, limitation, or suspension of immigration, and immigrants shall not be subject to personal maltreatment or abuse.

"Article II. Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exceptions which are accorded to the citizens and subjects of the most favored nations."

Treaty between the United States and China, November 17, 1880.

See, also, Chinese Exclusion Case, 130 U. S. 581, 9 Sup. Ct. 623, 32 L. Ed. 1068; Fong Yue Ting v. United States, 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905.

certain classes by legislation. The United States has passed laws excluding anarchists and polygamists and other laws restricting immigration.⁹⁹

(b) States generally claim the right to expel aliens regarded as endangering the safety of the state. There have been many examples of such expulsion.¹

In 1901 Mr. George Kennan, who had previously published criticisms upon the administration of the Siberian prisons, was expelled from Russia under the law which provides:

"Foreigners who have come into Russia with passports may be expelled from the Empire only upon the decision of a court of law or by order of the higher police authorities.

"Those foreigners whose behavior is suspicious and those who are not desirable as residents within the Empire may be expelled by order of the minister of the interior."

Of this expulsion Mr. Kennan wrote to the American Ambassador in St. Petersburg:

"A very courteous officer from the department of police called at my room this afternoon to inform me that by direction of the minister of the interior and in accordance with chapter 313 of Volume II of the laws of the Empire, I, as an 'untrustworthy' American citizen, am to be sent out of the country by the train leaving here for Germany at 10:30 tomorrow night. Meanwhile I am under close arrest in my room.

"Of course, they are acting within their right, and I have no complaint whatever to make, nor do I ask interposition on the part of the embassy. I merely wish you to know why it is impossible for me to make a farewell call upon you."²

(c) Aliens may be admitted conditionally, with the understanding that they are to have only certain privileges; e. g., the privilege of study or travel, but not the right to engage in business.

(d) The state usually claims full authority over aliens as regards police, sanitary, and penal jurisdiction. This does not extend to compulsory military service for political ends, though

⁹⁹ Act Feb. 20, 1907 (U. S. Comp. St. Supp. 1909, p. 447).

¹ 4 Moore, §§ 550-559.

² Foreign Relations U. S. 1901, pp. 451, 452.

an alien may enter the military service as a volunteer, or may be compelled to serve the state in the maintenance of public order, which may be as essential to him as to citizens. Such service might be in the defense against savages or irresponsible bodies of men.

(e) Rights of property and inheritance may be determined by local laws, and are not always the same for alien and national.

(f) A state may require a passport or other documentary evidence of identity. In some instances the documents of identification must contain the photograph of the alien, as well as the ordinary description of his physical characteristics.

EXTRADITION.

49. Extradition is the surrender by one state to another state for trial and punishment of a person accused of crime committed outside the jurisdiction of the state making the surrender.

Not only may a state expel an offender against its own well-being, but it may surrender a person accused of crime committed outside of its jurisdiction. This principle of extradition has long been recognized, though it cannot be claimed that there is a universally accepted right to demand a criminal who has sought refuge in a foreign state. Grotius in 1625 said: "Since, however, it is not customary for states to permit another state to enter its territory under arms for the sake of administering punishment, nor is it expedient, it follows that the state where the one who has committed the offense sojourns ought to do one of two things: Either on demand it should punish the guilty party, or it should turn him over for trial to the state making the demand."³ Treaties of extradition are particularly the product of the nineteenth century, though the practice of surrendering certain fugitives from justice was common among states in earlier days. There are now so many treaties of extradition that a criminal can rarely escape justice by flight to another state.

³ De Jure Belli ac Pacis, lib. II, c. XXI, § IV, 1.

(a) Extradition is an act of the state. While surrender is sometimes granted as an act of courtesy, extradition is usually based on treaty agreement. Mr. Justice Miller in 1886 said: "It is only in modern times that the nations of the earth have imposed upon themselves the obligation of delivering up these fugitives from justice to the states where their crimes were committed for trial and punishment. This has been done generally by treaties made by one independent government with another. Prior to these treaties, and apart from them, it may be stated, as the general result of the writers upon international law, that there was no well-defined obligation on one country to deliver up such fugitives to another, and, though such delivery was often made, it was upon the principle of comity, and within the discretion of the government whose action was invoked; and it has never been recognized as among those obligations of one government towards another which rest upon established principles of international law."⁴

(b) The crimes for which extradition is granted vary in the different treaties. In general, all crimes, except offenses against religious laws and such as are purely political, are regarded as extraditable. Political crimes, accompanied by acts of violence against the person or family of the sovereign, are usually made liable to extradition.⁵ Desertion from the military service is often excluded from the list of extraditable offenses.

(c) Nationals of a state, who have taken refuge in a foreign state and are accused of an extraditable crime committed within their own state, are usually extradited on demand. Extradition of the nationals of a state who are within its jurisdiction is at present at the discretion of the state, though they are usually given up on demand.⁶

Extradition may be delayed if the person requisitioned is charged with or under sentence for crime committed in the state within whose jurisdiction he is.

⁴ *United States v. Rauscher*, 119 U. S. 407, 7 Sup. Ct. 234. 30 L. Ed. 425.

⁵ 1 Moore, *Extradition*, p. 308; Treaty between the United States and Russia 1887, art. III.

⁶ 1 Moore, *Extradition*, p. 152.

When a fugitive from justice is claimed by two or more powers, later practice and treaties generally give preference to prior demand. Sometimes the gravity of the crime is considered.

(d) A person who has been surrendered to a state on account of an offense mentioned in an extradition treaty, and has satisfied the state as to that offense, is usually allowed a reasonable time in which to leave the state before prosecution for any crime committed previous to extradition.

(e) Procedure in extradition is well established. Extradition proceedings are usually through officials of national governments, though local officials are sometimes authorized to receive applications for requisitions.⁷ Requisitions must show evidence of an offense enumerated in the treaty between the states concerned and of the identity of the person demanded. Provisional arrest and detention is often permitted pending the presentation of the formal proofs upon which a demand for extradition is based.⁸

EXEMPTIONS FROM JURISDICTION.

50. Immunity from local jurisdiction is generally granted to certain officials of a foreign state and the persons or things under their control.

"The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers. * * *

"This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual in-

⁷ In case of the frontier states and territories of the United States and of Mexico, requisitions may under certain circumstances be made by local officials. Treaty of the United States and Mexico, Feb. 22, 1899, art. IX, 31 Stat. 1818.

⁸ For United States practice in general, see 4 Moore, §§ 579-622.

tercourse and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

"First. One of these is admitted to be the exemption of the person of the sovereign from arrest or detention within a foreign territory. * * *

"Second. A second case, standing on the same principles with the first, is the immunity which all civilized nations allow to foreign ministers. * * *

"Third. A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is where he allows the troops of a foreign prince to pass through his dominions." ⁹

(a) The sovereign is exempt from both civil and criminal jurisdiction.¹⁰ His retinue and hôtel or place of residence are exempt from local jurisdiction. He may not make his hôtel an asylum for those not of his retinue. A foreign sovereign may be invited to leave, or even be expelled by force, if his acts unduly endanger the peace of the state of his sojourn.

A sovereign may lay aside his official capacity and engage in business or travel incognito. He is then entitled to the privileges accorded to the position he has assumed, but can at any time resume his sovereign personality and the immunities appertaining thereto.

(b) A diplomatic agent, as a representative of the sovereignty of the state which sends him, is accorded immunities similar to those accorded to the sovereign.¹¹

(c) A consul, representing the commercial and business affairs of his state, is usually accorded the exemption needful for the performance of his functions.¹²

(d) It is held that the grant of free passage through a state for a foreign army "implies a waiver of all jurisdiction over

⁹ *Schooner Exchange v. McFaddon* (1812) 7 Cranch, 116, 3 L. Ed. 287.

¹⁰ In the case of *Vavasseur v. Krupp*, [1878] L. R. 9 Ch. Div. 351, it was decided that the Mikado of Japan was not liable under the English patent law. In the case of *Mighell v. Sultan of Johore*, 1 Q. B. [1894] 149, it was decided that the sovereign was exempt from suit for breach of promise of marriage.

¹¹ See section 61.

¹² See section 68.

the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments, which the government of his army may require."¹³

(e) Naval forces, entering or remaining within the maritime jurisdiction of a foreign state in time of peace, are usually exempt from local laws and regulations, except such as are necessary for the peace and well-being of the port.¹⁴ Naval vessels, and the boats, tenders, etc., belonging thereto, with their officers and crews, are exempt from local jurisdiction. This exemption does not necessarily extend to any of the officers or crew of the vessel who may violate the local law when on shore, though it is customary for local authorities to send to the commander members of his crew who have been guilty only of minor offenses on shore. The right of asylum on public vessels, formerly maintained, is now generally disclaimed, except in uncivilized regions, or in time of revolution, or under exceptional circumstances.¹⁵

The abuse of exemptions may lead to a request that the vessel be withdrawn, or in an extreme case to the use of force. The request would ordinarily be through the diplomatic agent of the state of the flag of the vessel. In recent years there has been a tendency to claim that a state which receives a foreign naval vessel within jurisdiction is under obligation to afford it a reasonable degree of protection. In a communication to the United States minister to Spain in regard to the destruction of the U. S. S. *Maine* in Habana harbor, the Secretary of State said of the responsibility of the Spanish govern-

¹³ *Exchange v. McFaddon*, 7 Cranch, 116, 3 L. Ed. 287.

¹⁴ By Belgian Royal Decree of February 18, 1901, art. VII, "captains of foreign men of war are required to observe the laws and regulations concerning the police, public health, taxes, and imposts, unless exception be made by particular convention or by international usage."

¹⁵ The U. S. Navy Regulations state: "308. The right of asylum for political or other refugees has no foundation in international law. In countries, however, where frequent insurrections occur, and constant instability of government exists, usage sanctions the granting of asylum; but even in the waters of such countries, officers should refuse all applications for asylum except when required by the interests of humanity in extreme or exceptional cases, such as the pursuit of a refugee by a mob. Officers must not directly nor indirectly invite refugees to accept asylum."

ment: "The *Maine*, on a peaceful errand, and with the knowledge and consent of that government, entered the harbor of Habana, relying upon the security and protection of a friendly port. Confessedly she still remained, as to what took place on board, under the jurisdiction of her own government, yet the control of the harbor remained in the Spanish government, which, as the sovereign of the place, was bound to render protection to persons and property there, and especially to the public ship and the sailors of a friendly power."¹⁶

Sailors from the U. S. S. *Baltimore* were attacked while on shore leave in Valparaiso on October 16, 1891. Several were wounded and one killed. Chili was at the time in a disturbed condition because of revolutionary movements. Chili paid an indemnity of \$75,000 to the injured seamen and to the families of those who had lost their lives.¹⁷

(f) Other public vessels, such as those engaged in hospital, scientific, transport, mail, telegraph, collier, or other service for the government of a state, and under state control, have been granted exemptions.

Public vessels engaged in philanthropic or scientific work and vessels engaged in exploration are usually accorded large immunity from local jurisdiction.

The court decided the troop ship *Athol* was beyond its jurisdiction when claims against it for damages on account of collision were brought in 1842.¹⁸

In the case of *The Parlement Belge* in 1880 the court decided "that an unarmed packet belonging to the sovereign of a foreign state, and in the hands of officers commissioned by him, and employed in carrying mails, is not liable to be seized in a suit in rem to recover redress for a collision, and this immunity is not lost by reason of the packet's also carrying merchandise and passengers for hire."¹⁹

Colliers and other vessels have been declared exempt from local jurisdiction.²⁰

¹⁶ *Foreign Relations U. S.* 1898, p. 1037.

¹⁷ *Foreign Relations U. S.* 1891, p. 194 ff.; *Id.* 1892, p. 54 ff.

¹⁸ 1 W. Rob. Adm. 374.

¹⁹ 5 L. R. Prob. Div. 197.

²⁰ *Symons v. Baker*, K. B. Div. Aug. 4, 1905; *Foreign Relations U. S.* 1885, pp. 343, 925; *The Constitution*, [1879] 48 L. J. Prob. Div. 13.

EXTRATERRITORIAL JURISDICTION.

51. In certain states, chiefly those possessing Oriental civilization, the nationals of Western states are by custom or by treaty in a large degree subject to the jurisdiction of their home state, or subject to some court not dependent on the state in which it acts.

From the early part of the seventeenth century, when permanent diplomatic agents began to be sent by states of Western civilization among themselves, the jurisdiction of consuls over their nationals declined. In the Mohammedan states consuls had already large jurisdiction. This was extended by capitulations, from the capitulation of Turkey and Great Britain in 1675, until in many cases this jurisdiction became almost exclusive as to nationals of the consul's own state.²¹

Similar jurisdiction was by treaty extended to other non-European states. China by treaties of 1844 and 1858 gave large powers of jurisdiction to the consuls of the United States.²² The clauses relating to the United States consular jurisdiction, incorporated in certain other treaties, are of simi-

²¹ A treaty between the Ottoman Empire and the United States in 1830 provides that citizens of the United States charged with crime "shall be tried by their minister or consul, and punished according to their offense, following in this respect the usage observed towards other Franks." Article IV.

²² Treaty between the United States and China 1858:

"Article XI. * * * Subjects of China guilty of any criminal act towards citizens of the United States shall be punished by the Chinese authorities according to the laws of China. And citizens of the United States, either on shore or in any merchant vessel, who may insult, trouble or wound the persons or injure the property of Chinese or commit any other improper act in China, shall be punished only by the consul or other public functionary thereto authorized according to the laws of the United States. Arrests in order to trial may be made by either the Chinese or the United States authorities."

"Article XXVII. All questions in regard to rights whether of property or person, arising between citizens of the United States in China shall be subject to the jurisdiction and regulated by the authorities of their own government. And all controversies occurring in China between citizens of the United States and the subjects of any other government shall be regulated by the treaties existing

lar effect, as in the treaty with Morocco, 1787; Tunis, 1797; Tripoli, 1805; Persia, 1856; Siam, 1856.

By the treaty of 1894 between the United States and Japan the jurisdiction granted to United States consuls by the treaty of 1858 was to come to an end July 17, 1899, and citizens of either state in the other were to have before the courts the rights of natives.

The regulations and laws for consular courts are prescribed by the state accrediting the consul.²³

In 1906 Congress established "the United States Court for China" which has "exclusive jurisdiction in all cases and judicial proceedings whereof jurisdiction may now be exercised by United States consuls and ministers by law and by virtue of treaties between the United States and China," where in civil cases the sum involved exceeds five hundred dollars and in criminal cases exceeds a fine of one hundred dollars or sixty days' imprisonment, or both. "The United States Court for China" has appellate jurisdiction in other cases which remain in the jurisdiction of the ordinary consular courts. Appeal may be taken from the "United States Court for China * * * to the United States Circuit Court of Appeals of the Ninth Judicial Circuit," and thence to the Supreme Court of the United States.²⁴

In Egypt there are specially constituted mixed courts, established by a convention of 1875, and exercising their functions since 1876.²⁵ These courts are mainly concerned with civil cases involving nationals of different states. There are three courts of first instance, having four foreign and three native judges, and one court of appeal, with seven foreign and four native judges.

between the United States and such governments respectively without interference on the part of China.

"Article XXVIII. * * * And if controversies arise between citizens of the United States and subjects of China, which cannot be amicably settled otherwise, the same shall be examined and decided conformably to justice and equity by the public officers of the two nations acting in conjunction."

²³ For Great Britain, see Foreign Jurisdiction Act 1890 (St. 53 & 54 Vict. c. 37); Piggott, *Exterritoriality*, p. 47.

²⁴ Act June 30, 1906 (U. S. Comp. St. Supp. 1909, p. 1045).

²⁵ 19 Stat. 662.

SERVITUDES.

52. Restrictions on the free exercise of the jurisdiction of a state in the way of obligation to allow a foreign state to do a thing, or in the way of obligation to a foreign state not to do a thing, are considered as servitudes.²⁶

Servitudes are usually classified as positive, consisting in the obligation to allow a foreign state to do a thing, or negative, consisting in the obligation of the state not to do a thing.

Servitudes may exist by prescription, or may be created by treaty. The right of the dominant state, which has the benefit of the servitude, as against the servient state, which suffers the servitude, must always be strictly construed.

Among servitudes are obligations of a state to allow the exercise of foreign jurisdiction within its territory. The admission of foreign troops, the cession of military and coaling stations, or the grant to foreign states of judicial and police functions, within a state, may give rise to servitudes. Many of these cessions, made in recent years, distinctly state that, while jurisdiction over the area is temporarily relinquished, sovereignty is retained.²⁷ Fishing rights in foreign territorial waters, the right to use foreign coasts or ports for special pur-

²⁶ *Servitutum non ea natura est, ut aliquid faciat quis, sed ut aliquid patiatur aut non faciat.* Digest, VIII, 1, 15; Fabres, *Des Servitudes dans le Droit International*. (1901).

²⁷ For Chinese leases, see *Foreign Relations U. S.* 1900, pp. 384, 388.

In the agreement between the United States and Cuba, February 16-23, 1903, the Republic of Cuba leased certain areas to the United States for coaling and naval stations under the following conditions:

"Article III. While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba, over the above-described areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas, with the right to acquire (under conditions to be hereafter agreed upon by the two governments) for the public purposes of the United States any land or other property therein by purchase or by exercise of eminent domain, with full compensation to the owners thereof."

poses, as for landing cables, etc., may be in the nature of servitudes.²⁸

Many treaties and other agreements have contained provisions by which a state is prevented from doing a thing which in absence of the agreement would be within its competence. Such agreements may place a limitation upon armament, limit the location of fortifications, limit jurisdiction over certain persons or places, or put a state under other disability.²⁹

²⁸ 1 Moore, § 163 ff.

²⁹ In some cases the restriction may be mutually undertaken as in article IX of the Russo-Japanese Treaty of September 5, 1905 (Treaty of Portsmouth). "Japan and Russia mutually agree not to construct within their respective possessions on the island of Saghalin, and the islands adjacent thereto, any fortification or similar military work. They likewise mutually agree not to adopt any military measures which might hinder the free navigation of the Straits of La Perouse and Tartary."

PART III
INTERCOURSE OF STATES

CHAPTER V.

DIPLOMATIC RELATIONS.

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THE HEAD OF THE STATE IN INTERNATIONAL RELATIONS.

- 53. The head of the state, as representing its sovereignty, acts for his state so far as he is legally competent, and is entitled to the status of a sovereign.**

It is necessary that in international relations some person represent the authority of the state. The head of the state, whether called emperor, king, president, or by other title, and whatever the limitation of his authority by local law, may act within his legal competence in international affairs on behalf of the state. The power possessed by heads of states varies according to the internal constitution of the state. The power of the head of a state may be almost absolute, or may be narrowly prescribed. The head of the state accredits and receives international agents of the higher grades, and authorizes them to act in behalf of the state.

The head of the state, whatever his title, is entitled to the honors and privileges due to a representative of the sovereignty of a state. He can claim the recognition of his title and form of address. When in a foreign state, the head of a state (a) is inviolable as to his person, and he must be given the widest possible freedom in his action; (b) is exempt from local law,

and is given the fullest degree of so-called extritoriality; (c) is entitled to the conventional honors, such as salutes, etc. There is a difference of opinion as to extent of the prerogatives to which the head of a republic is entitled. Some maintain that these are not equal to those of a monarch;¹ others would differentiate according as the head of the republic is sojourning in his official capacity or in his private capacity.² Later opinion inclines to like recognition of the heads of the states, regardless of titular designation. A head of a state, who is in a foreign state incognito, is entitled to the immunities and privileges due to the rank which he has assumed, though he may at any time assert his sovereign rank.

The exemption from jurisdiction in a foreign state does not imply that the visiting sovereign thereby acquires the right to exercise his own jurisdiction while in the foreign state. Courtesy usually allows him a measure of control over those attached to his person, and offenders among these may be sent to the sovereign's own state for trial.

At the present time negotiations among states are ordinarily carried on through the Department of Foreign Affairs, often under direction of the head of the state.

DEPARTMENT OF FOREIGN AFFAIRS.

- 54. The conduct of ordinary international negotiations within and on behalf of the state is intrusted to officials designated by the state for such functions, usually called a "department of foreign affairs."**

The office intrusted with the conduct of international negotiations, usually called the "Department of Foreign Affairs," since 1789 in the United States has been called the "Department of State," and has functions in addition to those involved in the conduct of foreign relations.³

¹ 1 Rivier, § 91.

² 1 Martens, § 80.

³ Previous to 1781 foreign affairs had been in charge of committees, etc. In 1781 a Secretary for Foreign Affairs was appointed; but the conduct of international relations was subject to many changes. Act July 27, 1789, provided for the establishment of a "Department of

The chief officer of such departments usually bears the title of "Minister" or "Secretary." He signs important documents issued by the head of the state, and in some of the less important matters acts for the state, as in accrediting *chargés d'affaires*. The functions of officers of the department dealing with foreign affairs are matters of state rather than of international law.

DIPLOMATIC AGENTS.

55. Diplomatic agents are commonly of four grades:

- (a) **Ambassadors, legates, and nuncios.**
- (b) **Envoys, ministers, and other persons accredited to sovereigns.**
- (c) **Ministers resident.**
- (d) **Chargés d'affaires.**

Agents of grades varying according to the service are appointed upon temporary or special mission.

The third grade, that of minister resident, was introduced by the Congress of Aix-la-Chapelle, November 21, 1818. The other grades had been prescribed at the Congress of Vienna, March 9, 1815.⁴

Foreign Affairs" (1 Stat. 28); but later in the same year the department was made custodian of the "acts, records, and seal of the United States," and intrusted with certain functions usually belonging to a department of the interior, and named the "Department of State" (1 Stat. 68). As other departments have been created in the United States, the functions of the Department of State have now become largely those of a department of foreign affairs. Hunt, "Department of State"; Michael, "Department of State."

The Bureaus of the United States Department of State are: Diplomatic; Consular; Indexes and Archives; Accounts; Rolls and Library; Trade Relations; Appointments; Citizenship; Near East; and Far East. There are also three Divisions: Western European Affairs; Latin-American Affairs; Information.

⁴ In the protocol of March 9, 1815, at the Congress of Vienna, an agreement was entered upon by Austria, Spain, France, Great Britain, Portugal, Prussia, Russia, and Sweden as follows:

"In order to prevent in future the inconveniences which have frequently occurred, and which may still occur, from the claims of precedence among the different diplomatic characters, the plenipotentiaries of the powers who signed the Treaty of Paris have agreed

From the thirteenth century, under the influence of the Italian city states, a system of foreign representation developed.⁵ In the fifteenth century the sending of permanent mis-

on the following articles, and think it their duty to invite those of other crowned heads to adopt the same regulations:

"Art. I. Diplomatic characters are divided into three classes: That of Ambassadors, Legatees, or Nuncios.

"That of Envoys, Ministers, or other persons, accredited to Sovereigns.

"That of *Chargés d'Affaires* accredited to Ministers for Foreign Affairs.

"Art. II. Ambassadors, Legatees, or Nuncios only shall have the representative character.

"Art. III. Diplomatic characters charged with any special mission shall not, on that account, assume any superiority of rank.

"Art. IV. Diplomatic characters shall rank in their respective classes according to the date of the official notification of their arrival.

"The present regulation shall not occasion any change respecting the representative of the Pope.

"Art. V. There shall be a regular form adopted by each state for the reception of diplomatic characters of every class.

"Art. VI. Ties of consanguinity or family alliance between courts confer no rank on their diplomatic agents. The same rule also applies to political alliances.

"Art. VII. In acts or treaties between several powers that admit alternity, the order which is to be observed in the signatures of ministers shall be decided by ballot." 1 Hertslet, 62.

At the Congress of Aix-la-Chapelle, article VIII was added, though Spain, Portugal, and Sweden were not parties to it:

"Art. VIII. It is agreed between the five courts that ministers resident accredited to them shall form, with respect to their precedence, an intermediate class between Ministers of the second class and *Chargés d'Affaires*." 1 Hertslet, 575.

Instructions to Diplomatic Officers of the United States, 1897, were in accord with the provisions of the Treaties of Vienna and Aix-la-Chapelle:

"Article I. Diplomatic agents are divided into three classes: That of ambassadors, legatees, or nuncios; that of envoys, ministers, or other persons accredited to sovereigns; that of *chargés d'affaires* accredited to sovereigns; that of *chargés d'affaires* accredited to ministers for foreign affairs."

⁵ "By a law of December 22, 1268, an ambassador was not allowed to be accompanied by his wife, lest she divulge his business; but he was required to take his own cook, lest he be poisoned." 1 Hill, *History of European Diplomacy*, p. 360.

sions became common.⁶ The post of foreign representative was not a popular one in the early days, either in the sending or receiving state, and laws were sometimes passed fixing the penalty for delaying or declining to undertake a diplomatic mission. The office has, however, steadily gained in dignity and honor, particularly since the Treaty of Westphalia in 1648.

The ranking of diplomats, at length settled in 1815, is now a matter of far less significance than in early days of permanent missions, when struggles for precedence often led to physical encounters between the suites of representatives of rival states.⁷

(a) Diplomatic agents of the first rank, ambassadors, legates, and nuncios, are theoretically held to represent the person and majesty of the accrediting sovereign. In states recognizing the

⁶ Nys, *Les Origines du droit international*, p. 297.

⁷ Wicquefort recounts many instances of contests in regard to precedence. Of an encounter between the followers of Vatteville, the French Ambassador, and those of Destrades, the Spanish Ambassador, in London in 1661, he says:

"They were both to send their coaches to meet Count Brahe, Ambassador from Sweden, on the Day of his Entry. And for as much as they made no doubt, but there would be a Contest about the Rank, they each of them took those Measures they judg'd necessary to procure the Advantage to his own side. Vatteville sent for some Soldiers from Ostend, made sure of several English; and instead of Traces, had caus'd Chains of a moderate Thickness to be cover'd with Leather, that they might not be liable to be cut. Destrades had indeed reinforc'd his Equipage a little; but not expecting things would come to such Extremities, he had not taken all the Precautions, which might have protected him from the Violence of others.

"The Duke of York, who fear'd and foresaw the Disorder, had caus'd a Troop of Horse, and three Companies of his Regiment of Foot to be drawn out; but as the Officers had no Orders to meddle with the Quarrel of the Embassadors, all they could do, was to be Spectators of the Fight and Confusion. Some of the French Embassador's Coach-Horses were kill'd, as well as two or three of his People. There were also some Spaniards who lost their Lives, but yet they carry'd the Day, because Destrades' Coach could not move without Horses. It was in Consequence of this Disorder, and of the Complaints Destrades made thereof, that the King of England ordain'd, that the foreign Ministers' Coaches should not for the future attend at this kind of Ceremonies." Wicquefort, *The Ambassador and his Functions*, p. 220.

papal supremacy, the papal representatives may be given precedence in their class.

(b) The diplomatic agents of the second class, envoys and ministers, are not considered as representing the person of the sovereign, but as representing the state.

(c) Ministers resident are usually upon less important missions. The institution of this rank in 1818 was not necessary, as the Congress of Vienna provided for the inclusion in the second class of "other persons accredited to sovereigns," and these resident ministers are within this category.

(d) The fourth class, *chargés d'affaires*, are accredited by and to the ministers of foreign affairs.

While the expediency of sending ambassadors to represent the United States had often been discussed,⁸ the United States had not been represented by diplomatic agents of the grade of ambassadors until after the act of March 1, 1893. By this act it was provided that, "whenever the President shall be advised that any foreign government is represented or is about to be represented in the United States by an ambassador, envoy extraordinary, minister plenipotentiary, minister resident, or special, envoy or *chargé d'affaires*, he is authorized in his discretion to direct that the representative of the United States to such government shall bear the same designation. This provision shall in no wise affect the duties, powers, or salary of such representative."⁹ In accord with this act the United States has gradually appointed ambassadors to the more important courts of the world.

APPOINTMENT.

56. As a diplomatic agent is supposed to represent the state, he is usually appointed by the head of the state, or by some authorized executive officer. Confirmation of the appointment may or may not be required.

In many states the diplomatic agents, except *chargés d'affaires*, are still, as almost universally in early times, regarded

⁸ 7 Moore, *American Diplomacy*, p. 263.

⁹ 27 Stat. 497, c. 182 (U. S. Comp. St. 1901, p. 1152).

as the personal representatives of the sovereign, and as such are appointed by and responsible to him.

Sometimes confirmation of the appointment may be required by the fundamental law of a state. This would ordinarily be the case in republics, where there might be fear of too great centralization of power in the hands of the head of the state.

The Constitution of the United States provides that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls."¹⁰

By an act of Congress the President of the United States "is authorized to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability for the branch of service into which he seeks to enter."¹¹ By an executive order of November 26, 1909, President Taft, on recommendation of Secretary Knox, directed that promotions within the diplomatic service be based on "special capacity" and that initial appointments from the outside to secretaryships be based upon stated examinations.

"The examinations shall be both oral and in writing, and shall include the following subjects: International law, diplomatic usage, and a knowledge of at least one modern language other than English, to wit, French, Spanish, or German; also the natural, industrial and commercial resources and the commerce of the United States, especially with reference to the possibilities of increasing and extending the trade of the United States with foreign countries; American history, government and institutions; and the modern history since 1850 of Europe, Latin America and the Far East. The object of the oral examination shall also be to determine the candidate's alertness, general contemporary information, and natural fitness for the service, including mental, moral, and physical qualifications, character, address, and general education and good command of English. In this part of the examination the applications previously filed will be given due weight by the Board of Examiners. In the determination of the final

¹⁰ Art. 2, § 2. ¹¹ Rev. St. § 1753 (U. S. Comp. St. 1901, p. 1200).

rating, the written and oral ratings shall be of equal weight. A physical examination shall also be included as supplemental.

"Examination papers shall be rated on a scale of 100, and no person with a general rating of less than 80 shall be certified as eligible.

"No person shall be certified as eligible who is under twenty-one or over fifty years of age, or who is not a citizen of the United States, or who is not of good character and habits and physically, mentally, and temperamentally qualified for the proper performance of diplomatic work, or who has not been specially designated by the President for appointment to the diplomatic service subject to examination and subject to the occurrence of an appropriate vacancy."

"In designations for appointment subject to examination and in appointments after examination, due regard will be had to the rule that, as between candidates of equal merit, appointments should be made so as to tend to secure proportional representation of all the states and territories in the diplomatic service; and neither in the designation for examination or certification or appointment after examination will the political affiliations of the candidates be considered."

This order does not necessarily preclude the appointment of such persons as the President may deem suitable to the higher diplomatic posts, but provision is made that "the Secretary of State is hereby directed to report from time to time to the President, along with his recommendations, the names of those secretaries of the higher grades in the diplomatic service who by reason of efficient service have demonstrated special capacity for promotion to be chiefs of mission."

THE RIGHT OF LEGATION.

57. The right of legation involves the right to send and the right to receive diplomatic agents, and in its fullness is possessed only by states having unqualified sovereignty.

The choice and sending of a diplomatic agent is usually regarded as an act of the sovereign person or of his representative. Diplomatic agents of the first three grades are accredited

to the sovereign person, and of the fourth grade to his minister of foreign affairs. The diplomatic agent bears a letter of credence, which gives his name, the grade and object of his mission, and requests favorable and full credence for him as the representative of the state.

While it is generally maintained that a state which is a member of the family of nations should receive a diplomatic agent from another state of the family, it is also established that it may decline to receive a person who is not acceptable. Such action does not imply any unfriendly disposition or discourtesy, but may be rather an expression of the belief that the particular person is not the one to carry on acceptably and to the satisfaction of both states their mutual intercourse. Under such circumstances the receiving state may indicate that the person suggested is a *persona non grata*. No reason need be given in such a case, though reasons are sometimes asked and given.

Among European countries it is customary to inquire in advance as to the acceptability of a given person as a diplomatic representative. The United States had not been accustomed to take any such preliminary step until the practice of sending ambassadors arose. On several occasions there has been considerable discussion in consequence of appointments made by the United States. In 1885 Italy informed the United States that Mr. Keiley, in consequence of certain utterances at a public meeting in 1871, would not be a *persona grata* as United States Minister to Italy, and Mr. Keiley returned his commission to the President.¹²

The subsequent appointment of Mr. Keiley as Minister to Austria-Hungary led to extended correspondence and a formal statement of the objections of Austria-Hungary.¹³ The President's message of December 8, 1885, says of this episode: "The Austro-Hungarian Government finally decided not to receive Mr. Keiley as the envoy of the United States, and that gentleman has since resigned his commission, leaving the post vacant. I have made no new nomination, and the interests of this government at Vienna are now in the care of the secretary of legation, acting as *chargé d'affaires ad interim*."

¹² Foreign Relations U. S., 1885, p. 550.

¹³ Id. p. 55. See, for other cases, Foster, *The Practice of Diplomacy*, c. III.

It is obviously to the advantage of both sending and receiving state that the diplomatic representative who is to carry on business between them should be a *persona grata*, and it seems to be in no way a derogation of sovereignty to inquire in advance whether a given person is wholly acceptable. It is not an objection to the reception of a diplomatic representative, but an objection to receiving a particular person in that capacity, which is raised.

SUITE OF DIPLOMAT.

58. The personnel of a mission varies according to the nature of the mission, but is usually both official and non-official. The official suite includes those directly in the service of the mission, and the nonofficial suite includes those directly connected with the diplomat's household.

(a) The official suite of a diplomatic representative varies greatly under differing conditions. The official suite may include (1) counselors; (2) secretaries; (3) attachés, military, naval, etc.; (4) interpreters and dragomans; (5) clerks; (6) couriers; (7) chaplain; (8) doctor; and other persons distinctly in the official service. The United States recently authorized ten "student interpreters" for China and six for Japan.¹⁴

(b) The nonofficial suite includes (1) the family and (2) those attached to the minister for the service in his household, as the private secretaries, chaplain, doctor, and domestic servants.

CREDENTIALS, ETC., OF DIPLOMAT.

59. Letters of credence from the head of the sending state to the head of the receiving state are given to diplomatic representatives of the grades above *chargés d'affaires*. Similar letters from and to respective foreign offices are given the *chargés d'affaires*.

Diplomatic representatives are also given instructions for their guidance in international negotiations and such other documents as may be essential to the effective performance of their mission.

The letters of credence given by different states and under different circumstances may vary somewhat, but in general

¹⁴ Acts approved March 12, 1904, and June 16, 1906.

give the name of the representative, the character and general object of the mission, and a request for favorable reception and treatment of the diplomat.¹⁵ A representative on a permanent mission needs no further authorization for the transaction of ordinary business; but for any special negotiation, as of a treaty or convention, he would generally require authorization by a special grant, called "full powers." Similarly diplomats on a special mission require full powers. Full powers are usually given in an open letter, signed by the head of the state, and may be unlimited and general, or limited and special. By the constitution of some states treaties must receive the assent of some body within the states before becoming operative. The full powers of representatives of such states would naturally be ad referendum. The diplomatic representative also usually receives a special passport, which serves to identify the diplo-

¹⁵ Form of U. S. Letter of Credence:

"A B....., "President of the United
States of America.

"To.....
.....
.....

"Great and Good Friend:

"I have made choice of one of our distinguished citizens, to reside near the Government of Your in the quality of..... He is well informed of the relative interests of the two countries and of our sincere desire to cultivate to the fullest extent the friendship which has so long subsisted between the two Governments. My knowledge of his high character and ability gives me entire confidence that he will constantly endeavor to advance the interest and prosperity of both Governments, and so render himself acceptable to Your

"I therefore request Your to receive him favorably, and to give full credence to what he shall say on the part of the United States, and to the assurances which I have charged him to convey to you of the best wishes of this Government for the prosperity of

"May God have Your in His wise keeping.

"Written at Washington this day of in the year

"Your good friend,

"By the President,

"A..... B.....

.....
"Secretary of State."

mat in his official capacity. This "differs from the ordinary passport, in that it usually describes the official rank or occupation of the holder, and often also the purpose of his traveling abroad, while generally omitting the description of his person."¹⁶ The passports are deposited with the Foreign Office of the state to which he is accredited, and remain there until he requests them when he leaves his post, or until they are given to him as an intimation that he is to retire.

Other papers, such as may be necessary for the business of the mission, are also given to the diplomat. These are such as special or general instructions, etc.

COMMENCEMENT OF MISSION.

60. A diplomatic mission to a specified state commences when proper credentials have been presented to and received by the government to which the diplomatic representative is accredited. A diplomatic mission to a congress or conference of different states commences when proper credentials are exchanged with other similar agents.

The ceremonial for the presentation and reception of diplomatic agents was formerly very elaborate, as the idea of personal sovereignty dictated.

"It may not be unfortunate that the monarch placed a high estimate upon the sovereign office, and devised a ceremonial commensurate with this estimate; for what was once done out of respect for and in response to the demand of a personal sovereign is now done out of respect for the dignity of the state itself. Thus, in the days of more democratic sovereignties, international representatives are clothed with a dignity which both elevates the attitude of participants in international negotiations and gives greater weight to their conclusions. The ceremonial also fixes a definite course of procedure, which any state may follow without giving offense to another, whether it be weak or powerful.

"While the minor details of the ceremonial of reception of a diplomatic agent are not invariable, certain customs are well established. A diplomat officially notifies the receiving state of his arrival by sending, (1) if he be of the first rank, a secretary

¹⁶ The American Passport, U. S. Dept. of State, p. 7.

of the embassy to the Minister of Foreign Affairs, with a copy of his letter of credence and a request for a day and hour when he may have an audience with the head of the state, in order to present his credentials; (2) if of the second rank, while sometimes the above procedure is allowed, he usually makes the announcement and request in writing; (3) if of the third rank, he always observes the last-mentioned procedure; (4) if of the fourth rank, *chargé d'affaires*, he notifies the Minister of Foreign Affairs of his arrival and requests an audience.

"The audience may be for any grade more or less formal, public or private. Usually diplomats of the first rank are received in public audience. At the audience the diplomat presents his letter of credence, and usually makes a brief address, of which he has earlier furnished a copy to the Minister of Foreign Affairs, in order that a suitable reply may be prepared. Diplomats of the second rank customarily receive a similar solemn audience. This may or may not be granted to ministers of the third rank. Official visits, varying somewhat in ceremonial in different states, follow."¹⁷

PRIVILEGES AND PREROGATIVES OF DIPLOMAT.

61. Diplomatic representatives are now generally accorded:

- (a) **Inviolability.**
- (b) **Exemption of person from criminal and civil jurisdiction.**
- (c) **Immunity of domicile. (*Franchise de l'hôtel*.)**
- (d) **Right of asylum.**
- (e) **Right of religion. (*Droit de culte*.)**
- (f) **Jurisdiction within domicile.**
- (g) **Precedence, ceremonial prerogatives, according to rank.**

(a) Inviolability of person is necessary, in order that a diplomat, as representative of a state, may be free in the performance of his functions. Inviolability has been granted from early times, and, according to Roman Law, "*Sancti habentur legati*." In earliest times ambassadors were usually chosen from the priestly class.

Inviolability extends to diplomats of all grades; to the suite, official and nonofficial; to the official residence, archives, and

¹⁷ Wilson & Tucker, *Int. Law* (5th Ed.) p. 172.

letters; and to all that belongs to the mission and is necessary for its maintenance.¹⁸ Inviolability and such immunities as are necessary for convenient passage are usually conceded to a diplomat while he is passing to or from his post through a third state and so long as he retains his official character.

A diplomatic representative is, of course, liable to the consequences to which he, acting in his private capacity, may voluntarily expose himself, as in dueling; and he may be restrained to such an extent as may be necessary to prevent him from willfully injuring the state or nationals of the state to which he is accredited. Physical force should be used against an ambassador only as a last resort. Force may be used in self-defense. In case he disturbs the internal peace of the state, his recall may be requested, or in an extreme case he may be expelled.

A diplomatic agent's public character and reputation is entitled to protection and respect. Whenever he engages in non-diplomatic undertakings, as in writing or lecturing upon religious or literary subjects, he is not exempt from criticism which may follow.

(b) It is now generally accepted that diplomatic representatives are exempt from prosecution and punishment for violation of criminal law. This does not free him from the obligation to respect the law enacted to insure the well-being of the state in which he is sojourning, but removes him from the legal authority of the state. For failure to observe law, a diplomat may be requested to leave a state, or in an extreme case may be expelled.¹⁹

The diplomatic representative is also free from civil jurisdiction. He cannot be pursued for debt; neither is his property liable to seizure. If he engages in business in a private capacity, his property thus engaged is liable, though he may not be constrained in such manner as to interfere with the performance of his diplomatic functions.²⁰

¹⁸ By article 46 of the Hague Convention for the Pacific Settlement of International Disputes the members of the Tribunal in service abroad enjoy diplomatic privileges and immunities, and by article 13 of the Prize Court Convention its judges have similar treatment.

¹⁹ 3 Phillimore, *Int. Law*, 160 et seq.

²⁰ Rev. St. U. S. §§ 4063, 4064 (U. S. Comp. St. 1901, pp. 2760, 2761).

He is also exempt from witness duty. United States diplomatic representatives are instructed not to testify without consent of the President.²¹ In the trial of the murderer of President Garfield, the Minister from Venezuela, under instructions from his government, waived his rights to immunity and appeared "as a witness in the case, the same as any witness who is a citizen of this country."²² The more common method is for a diplomatic representative to give testimony in the form of a deposition as an act of courtesy.

A diplomatic representative is exempt from direct personal taxes, and the property of the mission is also usually exempt from general taxes. The property may be held liable to assessments for betterments, as for construction of sewers, or for taxes for objects which serve the property, as for water, light, etc., though in many cases these are also waived. A diplomat is also usually allowed to bring in goods for his private use free of duty. Sometimes the principle of reciprocity is followed in making exemptions.²³

Diplomatic representatives are also exempt from the ordinary police regulations. This exemption is not to be construed as a license to disregard the regulations prescribed for the safety of the community. The diplomatic officer is supposed to be carefully observant of the law of the state in which he is sojourning, in order that his presence may be acceptable and his service may be most effective, because free from friction. A diplomatic representative who disregards local police regulations, as by driving a vehicle at a speed beyond the limits prescribed to insure public safety, may be restrained, though he may not be punished.

"In considering the immunities of diplomatic officers, it is important to draw a distinction, which, it is believed, has not usually been noticed, between measures of punishment and measures of prevention. The theory of diplomatic immunity is, not that the diplomatic officer is freed from the restraints of the law and exempt from the duty of observing them, but only that he cannot be punished for his failure to respect them. The punitive power of the state cannot be directly enforced

²¹ Foreign Relations U. S., 1894, p. 426.

²² 1 Guiteau's Trial, p. 136.

²³ 4 Moore, § 667.

against him. It will hardly be denied, however, that it is his duty to respect the laws of the country in which he resides, and that he may in many conceivable cases be prevented from doing unlawful acts, for which, if he were allowed to commit them, he could not be punished. This distinction is peculiarly applicable to police regulations made for the purpose of assuring the public health and safety."²⁴

(c) The domicile of a diplomatic officer, including his house, grounds, buildings, and appurtenances, including carriages, is considered exempt from local jurisdiction. This franchise de l'hôtel in earlier days extended to considerable areas, franchise du quartier, and in some states certain areas are still set apart for the foreign embassies.²⁵

(d) The so-called right of asylum in the house of a diplomatic officer was once considered as a sort of corollary to the immunity of the domicile of the ambassador. So early as the days of Grotius this right was questioned, and the writings of his successors in the seventeenth and eighteenth centuries generally gave it less and less sanction. Officers of the state in which an embassy is located are not entitled to enter without permission. Temporary shelter may therefore be secured when a fugitive enters the embassy. On demand of the proper official, the fugitive should be surrendered, unless he belongs to the embassy. The United States advises its diplomatic officers that "the privilege of immunity from local jurisdiction does not embrace the right of asylum for persons outside of a representative's diplomatic or personal household."²⁶ In practice the grant of asylum has been more common in states where the political conditions were unstable, or in time of revolution to political offenders.

(e) The diplomatic officer is allowed within his grounds freedom of worship, and often the services are open to the public, though it is held that an attempt to induce the public to enter by the ringing of a bell or otherwise may raise objection.

(f) As local jurisdiction does not extend to the house and

²⁴ 4 Moore, § 669.

²⁵ For description of the Legation Quarter in Peking, see Appendix Foreign Relations U. S., 1901, p. 330.

²⁶ Instructions to Diplomatic Officers, 1897, § 50.

grounds of the diplomatic representative, it is customary to grant to him jurisdiction within his residential and official domicile. This is now held to give to an ambassador jurisdiction, general charge over his retinue, and the right to arrest and send home for trial any one of his suite. Sometimes, when crimes are committed outside the embassy, the ambassador turns the offender over to the local authorities for trial.

(g) Questions of precedence and prerogatives received much attention in early days.²⁷ Precedence was fairly well established by the Congresses of Vienna, 1815, and Aix-la-Chapelle, 1818. At this time it was established that precedence among diplomats of the same rank should be according to the date of the official notification of their arrival. "A diplomat officially notifies the receiving state of his arrival by sending, (1) if he be of the first rank, a secretary of the embassy to the Minister of Foreign Affairs, with a copy of his letter of credence and a request for a day and hour when he may have an audience with the head of the state in order to present his credentials; (2) if of the second rank, while sometimes the above procedure is allowed, he usually makes the announcement and request in writing; (3) if of the third rank, he always observes the last-mentioned procedure; (4) if of the fourth rank, *chargé d'affaires*, he notifies the Minister of Foreign Affairs of his arrival and requests an audience."²⁸ The precedence among the different classes is for social purposes according to grade. In states receiving representatives of the Pope, these representatives are usually given precedence, regardless of the date of arrival. In some states precedence for business purposes is also according to grade; i. e., an ambassador, having right of personal access to the sovereign, arriving late at the residence of the sovereign or at a foreign office, would precede ministers already waiting to transact business with the sovereign or with the foreign secretary. In Turkey ambassadors claim and have access to the Sultan as the personal representatives of their sovereigns. The representatives of the United States, being for many years of the grade of minister, found it difficult to ob-

²⁷ Wicquefort, *The Ambassador and his Functions* (Digby's Trans.) p. 201; Bynkershoek, *De Foro Legatorum*, cc. I and XII.

²⁸ Wilson & Tucker, *Int. Law* (5th Ed.) p. 172.

tain from the Sultan prompt consideration for their business. President McKinley proposed to Turkey the mutual appointment of ambassadors. The proposition was renewed by President Roosevelt; but it was not until after the passage of the act of Congress of June 16, 1906, providing for the salary of an ambassador to Turkey, that Turkey heeded the wishes of the United States.²⁹ Until 1872 it was the custom for an ambassador to take precedence at the foreign office, even though a minister might be waiting when he arrived. This caused some friction at that time between the United States Minister to Germany, Mr. Bancroft, and the British ambassador. The rule was established for the German court that the chief of a mission arriving first should be first admitted, regardless of rank. This rule is now generally followed.

Precedence in conferences and congresses of states is now usually according to the French alphabetical order of the state names.³⁰ In signing treaties the same practice is now usually followed, where a number of states are signatories. In some treaties the name of the representative of the state appears first in the copy to be transmitted to his state.

When precedence is determined by nearness to the person at the head of the table, the first place is on his right; the second, at his left; the third, the second chair on the right; the fourth, the second chair on the left; and so to the foot of the table. In processions, precedence may vary. Sometimes it is the first place; sometimes, the last. In general, in relatively short processions, the following rules are observed: If of two, the first has the precedence; if of three, the middle is the place of honor, the first the second in honor, and the third the third in honor; if of four, the second is the place of honor, the first

²⁹ 34 Stat. 286.

³⁰ This was the arrangement at both the First Conference, 1899, and the Second Conference, 1907, at The Hague, though the United States as *Etats-Unis d'Amérique* was placed after Spain (*Espagne*) in 1899, and as *Amérique (Etats-Unis d')* was placed after Germany (*Allemagne*) in 1907. The use of the adjective "American," instead of "United States," in the diplomatic and consular service, was in accord with a circular of Secretary Hay of November 28, 1904. *Foreign Relations U. S.*, 1904, p. 7.

The precedence of ambassadors at Washington has caused some discussion. 4 Moore, p. 740, § 683.

the second in honor, the third and fourth in place third and fourth in honor; if of five, the middle is the place of honor, the place in advance the second in honor, the fourth place the third in honor, the first place the fourth in honor, and the fifth place the fifth in honor.³¹

The ceremonial for the reception of different grades of diplomats varies. Their prerogatives were formerly matters of grave concern. The different grades are now usually entitled to salutes by cannon according to rank: The ambassador, nineteen guns; the envoy extraordinary and minister plenipotentiary, fifteen; the minister resident, thirteen; and the chargé d'affaires, eleven.

Some of the prerogatives formerly regarded as ambassadorial, such as the right to remain covered in the presence of the sovereign while he remained covered, the right to a dais and throne in the reception chamber, the right to use a "coach and six with outriders," etc., are now regarded as interesting survivals of the days when personal sovereignty was more evident in international relations. The right to invitation to official functions, the right to the use of the coat of arms over the door, the right to the title of Excellency, etc., are now usually conceded without question.

Court dress or a diplomatic uniform is worn in many states. The question as to the proper dress of American diplomats has been discussed from time to time.³²

The entire body of diplomats accredited to a state constitute what is known as the "Diplomatic Corps." This body sometimes takes action upon matters which alike concern all the states represented or concern their own diplomatic rights or

³¹ 1 Pradier-Fodéré, *Cours de droit diplomatique*, p. 127.

³² The United States Instructions to Diplomatic officers provide:

"67. Military Title and Uniform.—The statute authorizes all officers who have served during the Rebellion as volunteers in the Army of the United States and have been honorably mustered out of the volunteer service to bear the official title, and, upon occasions of ceremony, to wear the uniform of the highest grade they have held by brevet or other commissions in the volunteer service (Rev. St. § 1226). In all other cases diplomatic officers are permitted to wear upon occasions of ceremony the dress which local usage prescribes as appropriate to the hour and place. At some capitals a court dress is prescribed by custom." See, also, 4 Moore, § 686.

privileges. When thus acting, the diplomat of the highest rank longest in service at the post acts as "Doyen," or the head, of the "Diplomatic Corps" except in states receiving representatives of the Pope, where the corresponding Papal representative may act as "Doyen," regardless of term of service.

DIPLOMATIC FUNCTIONS.

62. The chief functions of a permanent diplomatic officer are to represent his state in negotiations with the state to which he is accredited; to observe and report occurrences which may affect his state; to protect the rights of the nationals of his state. The functions of a diplomatic officer on a temporary or special mission are usually defined at the time of his appointment.

The general negotiations between states may be conducted between two states through the diplomatic officers of either of the states in the other, and in some cases both diplomats and both foreign offices may be concerned. Matters particularly appertaining to the state in which a diplomat is, and requiring attention of the local authorities, are usually transacted through the diplomat residing in the state, as in cases of extradition, where the procedure may be prescribed by treaty.³³

In early days diplomats were often regarded as little different from spies, and the means to which they sometimes resorted in order to obtain information were sometimes such as to justify the opinion. It is one of the main functions of a diplomatic officer to keep his state informed of the condition of affairs in the state to which he is accredited, and to send to his state such

³³ "And the government of Belgium will, upon request of the government of the United States, transmitted through the diplomatic agent of the United States, or, in his absence, through the competent consular officer, secure in conformity with law the provisional arrest of persons convicted or accused of the commission therein of crimes or offenses extraditable under this convention. But if the demand for surrender, with the formal proofs hereinbefore mentioned, be not made as aforesaid by the diplomatic agent of the demanding government, or, in his absence, by the competent consular officer, within forty days from the date of the commitment of the fugitive, the prisoner shall be discharged from custody." Treaty between United States and Belgium, Oct. 26, 1901, art. VII.

information of a character to be of service to his government as he may obtain.

Nationals of the state of the diplomatic representative who are sojourning in the state to which he is accredited are entitled to his protection to such extent as may be prescribed in the municipal law of his state. The questions arising in consequence of this duty of protection of nationals are most diverse and form a considerable bulk of diplomatic business. The United States diplomatic representatives always have many complications in consequence of the return to their native states of persons who have declared their intention of becoming or who have become United States citizens. The celebrated case of Martin Koszta in 1853 shows the claims made for a man who had declared his intention to become a citizen.³⁴ In the case of Predicaris, an American citizen was seized by bandits under Raisuli in Morocco in 1904. The United States sent a fleet to Tangier, and stated that the government "wants Predicaris alive or Raisuli dead."³⁵ Many cases have also arisen in consequence of the return to their native state of naturalized citizens who have failed to perform military service.

Numerous other duties, such as the conduct of the internal business of the mission, the issue and visé of passports, the extension of reasonable courtesies to his countrymen, the fulfillment of his social obligations in the state to which he is accredited, and the like, fall upon the permanent diplomatic representative.

The functions of the diplomat on a temporary mission are usually specific, and limited to the powers given in his letter of credence.

The functions of a diplomatic representative have become such as to make it necessary that he should have large contact with his fellow diplomats and other leading men. This involves certain expenditures commensurate with his position. Some states provide with reasonable liberality for such purposes, by furnishing official residences and necessary equipment. Other states furnish no residences and only small salaries, which make it impossible for other than men of large means to accept a dip-

³⁴ 3 Moore, §§ 490-491.

³⁵ Foreign Relations U. S., 1904, p. 503.

lomatic post. President Cleveland, in his message of December 2, 1895, said of the practice of the United States: "I am thoroughly convinced that, in addition to their salaries, our ambassadors and ministers at foreign courts should be provided by the government with official residences. The salaries of these officers are comparatively small, and in most cases insufficient to pay, with other necessary expenses, the cost of maintaining household establishments in keeping with their important and delicate functions. The usefulness of a nation's diplomatic representative undeniably depends much upon the appropriateness of his surroundings, and a country like ours, while avoiding unnecessary glitter and show, should be certain that it does not suffer in its relations with foreign nations through parsimony and shabbiness in its diplomatic outfit. These considerations, and the other advantages of having fixed and somewhat permanent locations for our embassies, would abundantly justify the moderate expenditure necessary to carry out this suggestion."³⁶

TERMINATION OF A DIPLOMATIC MISSION.

63. The mission of a diplomatic representative may be terminated:

- (a) **By recall.**
- (b) **By war or the interruption of amicable relations between the states.**
- (c) **By a change of government in the accrediting state.**
- (d) **By expiration of letter of credence.**
- (e) **By completion of the specific duty for which letters of credence were issued.**
- (f) **By personal departure of the agent for cause stated.**
- (g) **By change of grade.**
- (h) **By death of the agent.**
- (i) **By dismissal by the accrediting government.**
- (j) **Perhaps by the death or change of the sovereign in a monarchical state.**

(a) As the accrediting state has jurisdiction over its diplomatic representatives, it may recall the diplomat at pleasure. The procedure in recall is ordinarily similar to that of reception; i. e., the diplomat, if of grade above *chargé d'affaires*,

³⁶ *Id.*, 1895, XXXVII.

is received in solemn audience by the head of the state, or if a *chargé d'affaires*, by the Minister of Foreign Affairs. Recall, in the ordinary course of events, is merely a routine matter in the succession of officials. In time of strained relations, it may indicate the breaking of diplomatic intercourse. Sometimes recall is because of conduct displeasing either to the sending or receiving state, which would render the services of the diplomat less useful.³⁷

(b) War breaks off friendly relations between the belligerent states, and thereby terminates diplomatic relations. Necessary negotiations are under such circumstances usually intrusted to the diplomatic representatives of third states friendly to both belligerents.

(c) A complete change of government in a state which has sent out diplomatic representatives, as from a monarchy to a republic, often results in a change of diplomatic agents, on the ground that these representatives are probably not in sympathy with the new government. A simple change of parties in control of the administration formerly brought about extensive changes in the diplomatic service in the United States.

(d) Letters of credence to permanent ambassadors are now usually given without time limit; but when there is time specified the mission terminates at that time.

(e) The mission of diplomatic representatives appointed for special purposes usually terminates with the performance of the functions with which they were intrusted.

(f) Sometimes a mission is terminated by the diplomatic representative through request for his passports because of personal reasons. Such action does not break off diplomatic relations.

(g) When the grade of a diplomatic agent in a state is changed, he presents his letter of recall in his original capacity, which terminates that mission, though he may at the same time present his letter of credence in his new capacity.

(h) The death of a diplomat terminates the mission. The property, archives, etc., are usually placed in the custody of a secretary, or in his absence are taken in charge by representatives of friendly states. The dignity of his office is respected

³⁷ 4 Moore, § 639.

in the honors paid to the deceased diplomat, and the fullest immunities possible are extended to his suite. A time limit may, if expedient, be fixed for the departure of his suite.

(i) The state to which a diplomatic agent is accredited may dismiss him as an evidence of displeasure with his conduct,³⁸ or because of strained relations with his state. In case of dismissal for personal misconduct, another ambassador may be received. In case of dismissal on the ground of strained relations, the suspension may continue till normal relations are restored.

(j) Sometimes the death or change of the head of a state, where sovereignty is personal in nature, terminates the mission of all diplomats accredited to or by him, and new letters of credence must issue. So far as there is no change in the diplomatic personnel, the former order of seniority prevails, and the new letters of credence are regarded as in continuation of the old.

³⁸ In 1895 Venezuela dismissed the Belgian and French ministers, at the same time asserting "that the dismissal of the Belgian and French ministers was a purely personal act, due alone to the circumstance that those individuals had joined with certain other foreign representatives not now accredited to Venezuela in signing a certain protocol of conference containing gratuitous and defamatory statements reflecting upon the honor of the state and the integrity of its executive, which protocol was subsequently made public by the Italian government in the annual Green Book; that by so doing, of their own initiative and not in compliance with instructions from the friendly governments they represented, each of those gentlemen had rendered himself individually to the government of Venezuela persona non grata; and that in acting upon the situation so created, and in accordance with the usual course of independent states in such contingencies, Venezuela intended no affront to France or Belgium, whose flags she had conspicuously saluted on the same day that she dismissed their personally objectionable agents, but rather invited the continuance of the hitherto unbroken friendly relations through new agents, who should more fittingly reflect what she is happy to believe are the true sentiments of friendship which those governments feel for Venezuela." *Foreign Relations U. S.*, 1895, p. 41.

CHAPTER VI.

CONSULAR AND OTHER RELATIONS.

- 64. Consuls.
- 65. Functions of Consular Officers.
- 66. Appointment and Reception of Consuls.
- 67. Termination of Consular Office.
- 68. Immunities and Privileges of Consular Officers.
- 69. Other State Agents.

CONSULS.

64. A consul is an official appointed by a state mainly for the purpose of protecting and advancing its business, commerce, and navigation in a foreign state, in which he is officially permitted to exercise his functions.

Functions somewhat similar to those of consuls of modern times seem to have been exercised in very early days. There were commercial magistrates, who like the Roman *prætores mercatorum*, settled disputes of sailors on board vessels. The spread of commerce and the settlement in a particular quarter of a city of a number of foreigners engaged in trade made necessary some degree of protection of their interests. Sometimes officials whose functions corresponded somewhat closely to those of consuls were appointed by a ruler to care for the rights of his citizens abroad. Sometimes the consuls seem to have been chosen by the merchants themselves to look out for their interests. With the rise of permanent diplomatic missions and their development in the sixteenth and seventeenth centuries, the political and some of the other functions formerly performed by consuls passed to the ambassadors.¹ With the revival and extension of general commercial relations and the greater intercourse following improved means of communication since the end of the eighteenth century, the consular office has again increased in importance.²

¹ Nys, *Les Origines du droit international*, p. 286.

² For full treatment of United States system and practice, see "The Consular Service of the United States," Chester Lloyd Jones. See, also, "Le Consul," Ellery C. Stowell, 1909.

The foreigners in a city seem sometimes to have purchased the right to the benefit of their own laws, or of laws which they were willing to acknowledge. Very often states made treaties by which special laws should be applicable to the foreign traders. From the time of the Crusades examples of the exercise of consular jurisdiction are common. The foreign quarters of commercial towns were quite generally under foreign officers. In the commercial towns of Italy during the Middle Ages the consular institutions developed rapidly. In the Mohammedan countries the consuls by capitulations of the sovereigns came to have complete jurisdiction of the persons and interests of those of their own nationality. For a time the consuls had similar jurisdiction in some of the European states. In the Asiatic states the jurisdiction has tended to remain very wide, while in other states the tendency was to reduce it to the field of business and commercial interests.

The United States has appointed consuls since 1780, though its agents abroad discharged consular functions prior to that date. The service was formally established by an act of April 14, 1792.³

SAME—FUNCTIONS OF CONSULAR OFFICERS.

65. While the general functions of consuls are to watch over the commercial and business interests of the country which they serve, they are charged with many other duties, particularly in some non-Christian states.

The duties of consuls may be prescribed by municipal law or by treaty. The consul usually has large supervision over the maritime commerce of his state which may enter his jurisdiction. According to the law of some states, he receives the ship's papers on entrance to port. He may take depositions on board the ship, draw up, attest, certify, or authenticate acts, adjust differences arising on board between captain, officers, and crew, cause the arrest of deserters, adjust claims for damages, care for shipwrecked seamen, take charge of the wrecked vessel, authenticate the bill of sale of a vessel, etc.

By reports he is supposed to keep his state informed of the

³ 1 Stat. 254.

business and other conditions of which it would be serviceable for his state to be informed.

The range of consular reports is very comprehensive, and if desired information cannot be had from the reports it is often possible to obtain information from a special investigation, if application is made through the proper channel. A consul may be, and usually is, intrusted with many duties in the way of caring for and protecting the nationals of the state he is serving. He may aid in securing proper treatment by the courts, attest legal documents, examine witnesses, visé passports, care for the property and person of deceased nationals, etc.

In certain states not members of the family of nations the jurisdiction over nationals of states members of this family is intrusted to the consuls. This is exceptional jurisdiction, and will tend to disappear.⁴ The jurisdiction varies somewhat under different treaties. It may go so far as to cover all cases to which a consul's nationals are parties,⁵ may cover merely cases where a national is the defendant (here the consul or a representative may be present), may cover cases between nationals of the same or different foreign states;⁶ and may provide for mixed courts, as in Egypt since 1876, or make other provisions.⁷

The treaty between the United States and the Ottoman Empire of May 7, 1830, is an example of a treaty granting special consular jurisdiction:

⁴ United States consular courts in Japan were discontinued July 17, 1899, in accord with the treaty of November 22, 1894.

⁵ "His Highness, the Sultan of Borneo, agrees that in all cases where a citizen of the United States shall be accused of any crime committed in any part of His Highness' dominions the person so accused shall be exclusively tried and adjudged by the American consul, or other officer duly appointed for that purpose, and in all cases where disputes or differences may arise between American citizens, or between American citizens and the subjects of His Highness, or between American citizens and the citizens of subjects of any other foreign power, in the dominions of the Sultan of Borneo, the American consul or other duly appointed officer shall have power to hear and decide the same without any interference, molestation or hindrance, on the part of any authority of Borneo, either before, during or after the litigation." Treaty of June 23, 1850, art. 9.

⁶ United States Treaty with Persia, Dec. 13, 1856, art. 5.

⁷ A special court for China was created by Act Cong. June 30, 1906 (U. S. Comp. St. Supp. 1909, p. 1045).

"Article IV. If litigations and disputes should arise, between subjects of the Sublime Porte and citizens of the United States, the parties shall not be heard, nor shall judgment be pronounced unless the American dragoman be present. Causes, in which the sum may exceed five hundred piastres, shall be submitted to the Sublime Porte, to be decided according to the laws of equity and justice. Citizens of the United States of America, quietly pursuing their commerce, and not being charged or convicted of any crime or offense, shall not be molested; and even when they may have committed some offense, they shall not be arrested and put in prison, by the local authorities, but they shall be tried by their minister or consul, and punished according to their offense, following in this respect the usage observed towards other Franks."

The international court established in Egypt in 1876 took over some of the jurisdiction formerly exercised by the consular courts and remedied some of the evils in that form of jurisdiction. Mixed criminal cases, cases between citizens of different nations, still remain largely under the consular jurisdiction. The international tribunal may exercise "simple police" jurisdiction. Mixed civil causes were assigned for the most part to the international court. Three courts of the first instance, each consisting of four foreign and three native judges, and one court of appeal, consisting of seven foreign and four native judges, constituted the international courts.⁸

APPOINTMENT AND RECEPTION OF CONSULS.

66. Consuls general and consuls are usually appointed by a commission or patent from the head of the state, which is communicated to the government where he is to reside.

Vice and deputy consuls general and consuls are usually commissioned by the foreign secretary on recommendation of their chief.

Consular agents are similarly commissioned.

The authorization by which a consul is admitted to the performance of his functions by the foreign state is termed an "exequatur."

A consular officer may be a citizen of the appointing state, or a citizen of receiving state, or of some other foreign state, though some states decline to receive their own citizens as con-

⁸ 66 British and Foreign State Papers, 593.

sular representatives, and other states decline to accredit foreigners. It is the policy of the United States not to appoint foreigners or naturalized citizens to consular offices.

The grades of consular officers vary in different states. In the United States there are consuls general at large,⁹ consuls general, consuls, vice and deputy consuls general, vice and deputy consuls, commercial agents, vice commercial agents, consular agents, consular clerks, interpreters, marshals, and clerks.¹⁰ The vice consular officers are "substitute consular officers," and the deputy consular officers are "subordinate consular officers."¹¹

The commission or patent of the consuls general and consuls are usually from the head of the state,¹² while the vice consuls and consular agents are commissioned by the minister of foreign affairs in most states. China, however, empowers her foreign minister in a state to commission consular officers.

The exequatur by which a consular officer is authorized by the foreign state to perform his functions may or may not be formal, but in the United States is usually formal.¹³ Some-

⁹ Office created by Act April 5, 1906 (U. S. Comp. St. Supp. 1909, p 406).

¹⁰ Consular Regulations, 1896, 1.

¹¹ Rev. St. § 1674 (U. S. Comp. St. 1901, p. 1149).

¹² Commercial agents, a grade peculiar to the United States, receive commission from the President. Rev. St. § 1674 (U. S. Comp. St. 1901, p. 1149). This grade is not usually recognized in treaties.

¹³ Form of "Full Presidential Exequatur":

"....., President of the United States of America.

"To All to Whom It may Concern:

"Satisfactory evidence having been exhibited to me that has been appointed, I do hereby recognize him as such, and declare him free to exercise and enjoy such functions, powers, and privileges as are allowed to

[Seal of the United States.] "In testimony whereof, I have caused these letters to be made patent, and the seal of the United States to be hereunto affixed.

"Given under my hand at the city of Washington the day of, A. D. 19.., and of the Independence of the United States of America the

"By the President,

.....

".....,

"Secretary of State."

times it may take the form of an official notification of his recognition as consul, or an indorsement upon the consul's commission. Consuls general, on entering upon their office, notify the foreign office and the diplomatic representative, and consuls notify the foreign office and consul general.

By an executive order of June 27, 1906, the consular service of the United States was placed under the civil service act of 1883. New appointments were to be made from among candidates who had passed a satisfactory examination. "The scope and method of the examinations shall be determined by the board of examiners, but among the subjects shall be included at least one modern language other than English; the natural, industrial and commercial resources and the commerce of the United States, especially with reference to the possibilities of increasing and extending the trade of the United States with foreign countries; political economy; elements of international, commercial and maritime law." The age limit is between twenty-one and fifty.

"In designations for appointment subject to examination, and in appointments after examination, due regard will be had to the rule that, as between candidates of equal merit, appointments should be so made as to secure proportional representation of all the states and territories in the consular service; and neither in the designation for examination or certification or appointment will the political affiliations of the candidate be considered."

TERMINATION OF CONSULAR OFFICE.

67. The service of a consul may be terminated:

- (a) By recall.**
- (b) By expiration of period of appointment.**
- (c) By death.**
- (d) By withdrawal of exequatur.**

(a) Recall of a consular officer is a matter wholly within the jurisdiction of the sending state. The receiving state is not particularly concerned, as the service which he renders is particularly as to business affairs, rather than relating to matters of state.

(b) Certain states appoint consular officers for specific periods, at the expiration of which they are promoted, discharged, or otherwise changed in place.

(c) The death of a consular officer places the office in the hands of a subordinate, or, in absence of such officer, consuls of friendly states take custody.

(d) The withdrawal or revocation of the exequatur terminates the service of the consular officer, and is an act of which the state which granted it is the sole judge. It may, without offense to the sending state, be for any cause which the state issuing the exequatur may think sufficient.¹⁴ Usually a case is not so urgent that it is necessary to do more than suggest that the consul be recalled. Strained relations do not necessarily affect the exercise of consular functions.

IMMUNITIES AND PRIVILEGES OF CONSULAR OFFICERS.

68. Consular officers, who are citizens or subjects of the state appointing them, are usually accorded such immunities and privileges as are necessary for the convenient performance of their functions. These immunities and privileges usually are:

- (a) Inviolability of office and archives.**
- (b) Immunity from military service or burdens.**
- (c) Exemption from arrest except on criminal charge.**
- (d) Exemption from taxation if solely engaged in consular business.**
- (e) Exemption from witness duty, though testimony may be taken at the consulate, or the consul may be instructed to appear by his home government.**

¹⁴ Treaty between the United States and Spain, July 3, 1902:

"Article XIV. Consular officers shall receive, after presenting their commissions, and according to the formalities established in the respective countries, the exequatur required for the exercise of their functions, which shall be furnished to them free of cost; and on presentation of this document, they shall be admitted to the enjoyment of the rights, privileges and immunities granted to them by this treaty.

"The government granting the exequatur shall be at liberty to withdraw the same on stating the reasons for which it has thought proper so to do. Notice shall be given, on producing the commission, of the extent of the district allotted to the consular officer, and subsequently of the changes that may be made in this district."

- (f) Privilege of placing the arms of their state above the outer door, and of flying the national flag above the consulate, or above a vessel when engaged in discharge of official port duties.**
- (g) In some of the Eastern states special privileges similar to those accorded to diplomatic representatives.**

Any one accredited as consul, whether or not a citizen of the receiving state, when once given an exequatur, would be entitled to inviolability of office and archives, and to such other immunity as attaches to the office, as the privilege of use of the arms above the door. If the consul is a citizen of, or a domiciled alien in, the receiving state, his immunities and privileges are usually strictly limited. If an alien engages in other business while holding a consular office, he is liable to the local laws to the extent which his business brings him under their provisions. So long as he is allowed an exequatur, he is entitled to perform his consular functions; but he does not have special privileges for other purposes.

In time of war the consular flag specially protects the consulate. In some states the consulate has at times been used as an asylum for political and other refugees. The United States has discountenanced the use of the residences of its diplomatic representatives for such purpose, and the use of a consulate for such purpose would be still more open to objection.¹⁵

The immunities of consular officers are quite fully set forth in the Treaty between the United States and Spain of July 3, 1902:

"Article XV. All consular officers, citizens or subjects of the country which has appointed them, shall be exempted from military billeting and contributions, and shall enjoy personal immunity from arrest or imprisonment except for acts constituting crimes or misdemeanors by the laws of the country to which they are commissioned. They shall also be exempt from all national, state, provincial and municipal taxes except on real estate situated in, or capital invested in, the country to which they are commissioned. If, however, they are engaged in professional business, trade, manufacture or commerce, they shall not enjoy such exemption from taxes, but shall be subject

¹⁵ Foreign Relations U. S., 1899, p. 256.

to the same taxes as are paid under similar circumstances by foreigners of the most favored nation, and shall not be entitled to plead their consular privilege to avoid professional or commercial liabilities.

"Article XVI. If the testimony of a consular officer, who is a citizen or subject of the state by which he was appointed, and who is not engaged in business, is needed before the courts of either country, he shall be invited in writing to appear in court, and if unable to do so, his testimony shall be requested in writing, or be taken orally at his dwelling or office.

"To obtain the testimony of such consular officer before the courts of the country where he may exercise his functions, the interested party in civil cases, or the accused in criminal cases, shall apply to the competent judge, who shall invite the consular officer in the manner prescribed above, to give his testimony.

"It shall be the duty of said consular officer to comply with this request, without any delay which can be avoided. Nothing in the foregoing part of this article, however, shall be construed to conflict with the provisions of the sixth article of the amendments to the Constitution of the United States, or with like provisions in the Constitutions of the several states, whereby the right is secured to persons charged with crimes, to obtain witnesses in their favor, and to be confronted with the witnesses against them.

"Article XVII. Consuls general, consuls, vice consuls, and consular agents may place over the outer door of their office the arms of their nation with this inscription 'Consulate,' 'Vice Consulate,' or 'Consular Agency of the United States,' or 'Spain.'

"They may also hoist the flag of their country over the house in which the consular office is, provided they do not reside in the capital in which the legation of their country is established, and also upon any vessel employed by them in port in the discharge of their official duties.

"The consular offices and archives shall be at all times inviolable. The local authorities shall not be allowed to enter such offices under any pretext, nor shall they in any case examine or take possession of the official papers therein deposited. These offices, however, shall never serve as place of asylum.

"When the consular officer is engaged in trade, professional business or manufacture, the papers and archives relating to the business of the consulate must be kept separate and apart from all others."

OTHER STATE AGENTS.

69. There may be agents of a state who have no acknowledged diplomatic or consular character such as secret agents, special commissioners, bearers of dispatches, etc.

It may be that under special circumstances a state may desire to send, and another state may desire to receive, an agent whose status and business is not publicly disclosed. So far as the sending and receiving states are concerned, such an agent is entitled to all the privileges and immunities which appertain to his office. As his status is not publicly known, he cannot, without disclosing it, claim its privileges, and such a disclosure would not accord with his mission, nor would he expect to be accorded privileges by third powers.

Agents are also sometimes sent to ascertain the condition of affairs in a territory where insurrection prevails, and in a more public manner to a recognized belligerent.

Commissioners are often sent on special foreign service, which does not require the grant of any diplomatic or consular privileges. Such commissioners may be sent for various services, as to fix boundary lines, arrange for highways of commerce between states, make investigations, etc. They are usually accorded such courteous treatment as will facilitate the performance of their functions.

Bearers of public dispatches, even though not the regular dispatch agents of a state, would, if their character were established, be accorded reasonable exemptions.

Some other state agents, such as spies, and those engaged in other secret service without the consent, tacit or direct, of the state in which they are may be expelled or treated in such manner as the authorities of the state where they are found may determine.

Sometimes such agents, while secretly in a foreign state, are allowed to remain without interference, as when reporting the movements of insurgent leaders, anarchists, etc.

CHAPTER VII.

TREATIES AND OTHER INTERNATIONAL AGREEMENTS.

- 70. Treaty Defined.
- 71. Other Agreements between States.
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TREATY DEFINED.

70. A treaty is an agreement between two or more states in conformity to law.

A treaty is the most formal agreement between states, and usually relates to matters of general concern, as a treaty of peace, or to matters of high importance, as cession of territory. "A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it."¹ Treaties are usually in writing. Treaties may relate to any subject within the competence of the treaty-making power.² The term "treaty" is also loosely used as the general term to designate any form of international agreement.

Separate articles, or sole articles, explanatory of a treaty, may be agreed upon at the time of the negotiation of the treaty, or at a subsequent date, and are separately ratified.

¹ *Edye v. Robertson*, 112 U. S. 580, 5 Sup. Ct. 247, 28 L. Ed. 798; *The Diamond Rings*, 183 U. S. 182, 22 Sup. Ct. 59, 46 L. Ed. 138.

² 1 Butler, *Treaty Making of the United States*, § 3.

OTHER AGREEMENTS BETWEEN STATES.

71. (a) A convention usually relates to some specific subject rather than to matters of general character, as in the case of a treaty.
- (b) A protocol, or *procès verbal*, generally referring to an agreement already made or to be made, is usually less formal than a convention, both in phrasing and arrangement. Protocols are sometimes formally ratified by the treaty-making power, and sometimes are simply the signed minutes of a conference.
- (c) An agreement, an arrangement or a *modus vivendi*, usually prescribes in detail the line of conduct which will be followed in interstate relations under certain conditions.
- (d) Declarations are usually in the form of reciprocal agreements, relating to the rights and privileges of the nationals of the states. The term "declaration" is also applied to the formal statement of the principles in accord with which states propose to act, or to the formal statement of the grounds for an action.
- (e) Cartels are agreements concluded between belligerents in regard to intercourse in time of war.
- (f) Sponsions, or agreements *sub spe rati*, are agreements made between representatives of states not properly commissioned, or agreements made by representatives in excess of authority.

The terms "treaty," "convention," "protocol," etc., are often used without clear distinction.

(a) Convention is the usual term given to agreements in regard to consular relations, naturalization, extradition, postal relations, and the like.

(b) Protocols vary greatly, but generally are preparatory to a more formal agreement. A protocol was signed by the plenipotentiaries of the various powers at the conclusion of the so-called "Boxer Troubles" in 1900.³ A protocol, embodying the terms of a basis for the establishment of peace between the United States and Spain, was signed by the United States Secretary of State and the French Ambassador, representing Spain, on August 12, 1898 and was preliminary to the treaty

³ Foreign Relations U. S., 1901, Appendix, p. 306. For the negotiations, signing, etc., see preceding pages.

of peace. The official minutes of a conference often take the form of a protocol, when signed by the accredited representatives.

(c) Arrangements, agreements, *modi vivendi*, take many forms and relate to many subjects. An arrangement was made between the United States and Great Britain in 1817 in regard to the naval force to be maintained upon the American boundary lakes.⁴ A reciprocal commercial agreement was entered into between the United States and France May 28, 1898.⁵ The United States and Great Britain have entered into many *modi vivendi*, particularly in regard to temporary adjustments of difficulties over fishing rights on the adjacent seas.⁶

(d) Declarations frequently confer reciprocal trade-mark or copyright privileges upon the nationals of the states becoming parties thereto.⁷ The declaration of Paris of 1856 set forth the principles which the states proposed to follow in maritime warfare.⁸ A declaration of war usually sets forth the reasons for entering upon hostilities.

(e) Cartels are agreements between belligerents in regard to intercourse in time of war. Cartels have been made relating

⁴ "The naval force to be maintained upon the American lakes, by His Majesty and the government of the United States, shall henceforth be confined to the following vessels on each side; that is:

"On Lake Ontario, to one vessel, not exceeding one hundred tons burden, and armed with one eighteen-pound cannon.

"On the upper lakes, to two vessels, not exceeding like burden each, and armed with like force.

"On the waters of Lake Champlain, to one vessel, not exceeding like burden, and armed with like force.

"All other armed vessels on these lakes shall be forthwith dismantled, and no other vessels of war shall be there built or armed.

"If either party should hereafter be desirous of annulling this stipulation, and should give notice to that effect to the other party, it shall cease to be binding after the expiration of six months from the date of such notice.

"The naval force so to be limited shall be restricted to such services as will, in no respect, interfere with the proper duties of the armed vessels of the other party." 8 Stat. p. 231.

⁵ 30 Stat. 1774.

⁶ *Modus vivendi* respecting Fisheries on Newfoundland Treaty Coast, Oct. 6-8, 1906.

⁷ United States and Russian Agreement, March 28, 1874.

⁸ Appendix, p. 487.

to telegraphic, mail, and like services, but most frequently relate to the exchange of prisoners.

(f) Sponsions, or agreements *sub spe rati* are often made where new conditions arise after negotiators are appointed, which make it seem expedient that an agreement should be made which is beyond their powers, and that it should be entered upon subject to subsequent rejection or ratification by their government. This form was more common in earlier times, when negotiators could not so easily communicate with their home governments and obtain extension of powers.

ESSENTIALS OF VALID TREATY.

72. It is generally recognized that the essentials of a valid treaty or contract between two or more states are:

- (a) **Capacity of the parties to contract.**
- (b) **Duly empowered agents to act on behalf of the states.**
- (c) **Freedom of consent.**
- (d) **An object in conformity to law.**

(a) The capacity of a state to make a treaty may be limited in certain respects by its fundamental law, as is usually the case in states having written constitutions, even though the limitations are only implied,⁹ or may be limited by the relations which a state sustains to other states, as in the case of states whose existence is under restrictions, such as neutralized states.

(b) In every state certain agents have, under certain conditions, the power to bind their state by their contracts.¹⁰ If, however, these agents exceed their powers, the state is not bound. Where their acts are not ratified, and the state has received some material advantage as a result of the agreement

⁹ "The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government and of that of the States." *De Geofroy v. Riggs*, 133 U. S. 258, 10 Sup. Ct. 295, 33 L. Ed. 642.

¹⁰ "He [the President] shall have power, by and with the advice and consent of the Senate to make treaties, provided two-thirds of the Senators present concur." Const. U. S., art. 2, § 2 (2).

entered into by them, or where the other contracting state has performed acts in pursuance of the agreement, it is the duty of the state receiving the benefits, or the action of whose agent caused the performance of the acts mentioned, either to make proper compensation or to restore the former status as far as practicable. If the agent has clearly exceeded his powers in such a manner that this fact should have been known to the other party, there is no obligation upon the agent's state.

(c) Many treaties are made in order to bring to an end further use of force. The state is, however, held to be free to continue to resist or to agree upon terms. The use of force, if a proper means of redress, cannot be made to vitiate a contract resulting from its use. A state can enter into a perfectly valid contract which has been forced upon it, however disadvantageous its terms may be, provided it does not part with an essential to its existence. No state can be supposed to be willing to part with independence as a result of constraint, and, when this results, the contract is assumed to be vitiated by the constraint. In case constraint be imposed upon the person of the sovereign of a state or upon the person of a commander, or of an agent authorized to negotiate a treaty, the state which he represents is in no manner bound by his acts, and all such contracts are absolutely void. If the consent of an agent of a state is obtained through fraud, the contract resulting therefrom is not valid.

(d) A treaty which does not conform to international law and established usages may be void or voidable, as a treaty which has as an object the exercise of proprietary rights over the open sea, or a treaty contrary to the recognized rights of humanity, as for the establishment or protection of the slave trade.

FORM OF THE CONTRACT.

73. While no prescribed form is necessary, contracts between states are usually in the form of written agreements, signed by or in behalf of the treaty-making power of the states parties to the contract.

Agreements may even be made by the display of symbols by agents of a state, as in the raising of a white flag in token

of surrender. Verbal agreements between sovereigns have been held as binding upon states, particularly in earlier times, when the sovereign often had absolute power. Less formal agreements are sometimes made by the exchange of notes between agents of states.

In general, however, interstate contracts are of such importance that they are entered upon with much formality. Usually a preamble, containing the names of the heads of the states or their representatives, is followed by a statement of the reasons for the negotiation of the treaty. The body of the treaty ordinarily consists of numbered articles, setting forth the agreements to which the states have come. The stipulations in regard to ratification, duration, accession of other states, denunciation, and similar provisions, are usually followed by the signatures and seals of the negotiators.¹¹

¹¹ 2 Pradier-Fodéré, *Droit Int. Public*, §§ 1086-1096. The usual form may be seen in the treaty between the United States and Great Britain to facilitate the construction of a ship canal, concluded November 18, 1901:

"The United States of America and His Majesty Edward the Seventh, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King, and Emperor of India, being desirous to facilitate the construction of a ship canal to connect the Atlantic and Pacific Oceans, by whatever route may be considered expedient, and to that end to remove any objection which may arise out of the Convention of the 19th April, 1850, commonly called the Clayton-Bulwer Treaty, to the construction of such canal under the auspices of the government of the United States, without impairing the 'general principle' of neutralization established in article VIII of that Convention, have for that purpose appointed as their plenipotentiaries:

"The President of the United States, John Hay, Secretary of State of the United States of America;

"And His Majesty Edward the Seventh, of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, King and Emperor of India, the Right Honorable Lord Pauncefoot, G. C. B., G. C. M. G., His Majesty's Ambassador Extraordinary and Plenipotentiary to the United States;

"Who, having communicated to each other their full powers, which were found to be in due and proper form, have agreed upon the following articles:

"[Here follows the body of the treaty.]

"Article V. The present treaty shall be ratified by the President of the United States, by and with the advice and consent of the Sen-

While the above is the common form, treaties vary greatly in form. The order of signing was in early times often a subject of discussion. At present the most common order is in accord with the alphabetical order of the names of the states, and usually following the order in the French language, where several states are parties to the treaty. Sometimes the order is determined by lot. In the draft of the treaty for his own state, the representative of that state may, following the principle of the alternat, sign first.

RATIFICATION.

74. Ratification is the act by which the treaty-making power approves and confirms that which has been agreed upon by its authorized agent or agents.

The fundamental law of a state in many states prescribes the procedure in making and ratifying treaties. In monarchies the ratifying power is generally in the monarch, provided the treaty does not alienate territory or change the status of nationals,¹² and in republics in some representative body.

In some cases ratification may not be necessary, as in cases where treaties are concluded by functionaries having treaty-making power. Usually, however, the signing of a treaty by the representatives of the states is an indication that they have reached an agreement. Whether this agreement will commend itself to the states by which they are accredited is to be determined by subsequent ratification. Many treaties are now concluded subject to ratification, even if the fundamental law of a state does not prescribe this method, and even if this condition is not mentioned in the treaty. If no time for ratification is specified, a reasonable period is presumed to be allowed. Rat-

ate thereof, and by His Britannic Majesty; and the ratifications shall be exchanged at Washington or at London at the earliest possible time within six months from the date hereof.

"In faith whereof the respective plenipotentiaries have signed this treaty and thereunto affixed their seals.

"Done in duplicate at Washington, the 18th day of November, in the year of Our Lord one thousand nine hundred and one.

"John Hay. [Seal.]

"Pauncefote. [Seal.]"

¹² Crandall, *Treaties, Their Making and Enforcement*.

ification must be by the treaty-making power or by an authorized agent. It is generally held that it must be complete, for partial ratification would in effect be a new treaty. The form of ratification varies. Sometimes it may even be tacit, by fulfilling the terms of the treaty; but it is more often formal, by the exchange of documents, sometimes reciting the whole treaty, sometimes reciting merely the preamble, the names of the negotiators, the date of signing, etc.; i. e., the earlier and later clauses of the treaty to such an extent as to make its identification certain.

"The exchange of ratifications is usually a solemn—i. e., highly formal—ceremony by which parties to the treaty or convention guarantee to each other the execution of its terms. As many copies of the act of ratification are prepared by each state as there are state parties to the treaty. When the representatives of the states assemble for the exchange of ratifications, they submit them to each other. These are carefully compared, and, if found in correct form, they make the exchange and draw up a *procès verbal* of the fact, making as many copies of the *procès verbal* as there are parties to the treaty. At this time, also, a date for putting into operation the provisions of the treaty may be fixed. Sometimes clauses explanatory of words, phrases, etc., in the body of the treaty, are agreed upon. Such action usually takes the form of a special *procès verbal*, or protocol."¹³

While ratification generally follows the negotiation of a treaty, it is not now maintained, as was formerly held by many, that ratification is legally or even morally obligatory. The United States Senate has on various occasions refused to ratify, or ratified an amended treaty, which was in effect a refusal to ratify, the agreement which the negotiators had made.¹⁴ Ratification may be refused for sufficient reason, though there may be differences of opinion as to what constitutes sufficient reason for such refusal.

¹³ Wilson & Tucker, *Int. Law* (5th Ed.) p. 212.

¹⁴ This was the case with certain reciprocity treaties at the end of the nineteenth century and with certain arbitration treaties in the early twentieth century. The Senate also modified the proposed treaty with Great Britain concerning the Nicaragua Canal, signed February 5, 1900.

"The following have been offered at various times as valid reasons for refusal of ratification: (1) Error in points essential to the agreement; (2) the introduction of matters of which the instructions of the plenipotentiaries do not give them power to treat; (3) clauses contrary to the public law of either of the states; (4) a change in the circumstances, making the fulfillment of the stipulations unreasonable; (5) the introduction of conditions impossible of fulfillment; (6) the failure to meet the approval of the political authority whose approval is necessary to give the treaty effect; (7) the lack of proper credentials on the part of the negotiators, or the lack of freedom in negotiating."¹⁵

Ratification makes the treaty binding. While there is some difference of opinion as to whether the date upon which a treaty becomes binding is the date of ratification, or the date of the signing of the treaty, the United States Supreme Court has held that after ratification, as between the governments, a treaty "is considered as concluded and binding from the date of signature," while, as regards persons, it is binding only from the date of ratification and proclamation.¹⁶ The proclamation or promulgation of a treaty or publication of the contents of a treaty may be delayed, as in the case of a secret treaty. The treaty is in such case binding on the state, but not upon its citizens, who are ignorant of its provisions. The method of making a treaty known is a matter of municipal law.

INTERPRETATION OF TREATIES.

75. Treaties should receive reasonable interpretation. In case of doubt in regard to interpretation, the following rules have been generally accepted:

- (a) When there is doubt as to the interpretation of the words of a treaty: (1) The words are to be interpreted in their usual sense, unless this involves an absurdity or is incompatible with the general provisions of the treaty; (2) words having more than one meaning are interpreted in the more general sense, rather than the technical sense, unless clearly used in the technical**

¹⁵ Wilson & Tucker, Int. Law (5th Ed.) 211.

¹⁶ *Haver v. Yaker*, 9 Wall. 32, 19 L. Ed. 571. For full discussion, see 2 Butler, Treaty-Making Power of the United States, § 383.

sense; (3) words are to be interpreted as understood at the time of the negotiation of the treaty and favorably to the party assuming an obligation.

- (b) When there is doubt as to the interpretation of the provisions of a treaty: (1) That which is specifically stated prevails against the more general; (2) provisions operating unequally may be strictly construed by the party suffering the greater burden; (3) single provisions should be interpreted with reference to the whole treaty.
- (c) In case of conflict between different treaties: (1) If between treaties to which the same states are parties, the later treaty is binding; (2) if between earlier and later treaties to which the same states are not parties, the earlier treaty is binding.

The rules of interpretation have been set forth at various times by the Supreme Court of the United States. In the case of *De Geofroy v. Riggs*, in 1890, the court said:

"It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this court that, where a treaty admits of two constructions, one restrictive of rights that may be claimed under it, and the other favorable to them, the latter is preferred."¹⁷

In 1902, in the case of *Tucker v. Alexandroff*, the broad basis of interpretation was stated: "As treaties are solemn engagements entered into between independent nations for the common advancement of their interests and the interests of civilization, and as their main object is, not only to avoid war and secure a lasting and perpetual peace, but to promote a friendly feeling between the people of the two countries, they should be interpreted in that broad and liberal spirit which is calculated to make for the existence of a perpetual amity so far as it can be done without the sacrifice of individual rights or those prin-

¹⁷ *De Geofroy v. Riggs*, 133 U. S. 258, 10 Sup. Ct. 295, 33 L. Ed. 642. See, also, *Hauenstein v. Lynham*, 100 U. S. 487, 25 L. Ed. 628.

ciples of personal liberty which lie at the foundation of our jurisprudence.”¹⁸

While many rules for the interpretation of treaties have been given by various writers,¹⁹ controversies in regard to interpretation have in fact often resulted in the making of new treaties which would secure the objects sought by the states. Sometimes a protocol or declaration is added to a treaty interpreting the treaty; e. g., in the protocol of April 29, 1872, between the United States and the German Empire, it is stated that “the expression ‘property,’ used in the English text of articles III and IX, is to be construed as meaning and intending ‘real estate.’”

In recent years it has become common to refer disputes as to the construction of treaties to arbitration, and many general and special agreements have been made to this effect. The United States has entered upon a policy of reference of differences of interpretation to arbitration, as follows:

“Differences which may arise of a legal nature, or relating to the interpretation of treaties existing between the two contracting parties, and which it may not have been possible to settle by diplomacy, shall be referred to the Permanent Court of Arbitration established at The Hague by the Convention of the 29th July, 1899: Provided, nevertheless, that they do not affect the vital interests, the independence, or the honor of either of the two contracting states, and do not concern the interests of third parties.

“In each individual case the high contracting parties, before appealing to the Permanent Court of Arbitration, shall conclude a special agreement defining clearly the matter in dispute, the scope of the powers of the arbitrators, and the periods to be fixed for the formation of the arbitral tribunal and the several stages of the procedure. It is understood that, on the part of the United States, such special agreements will be made by the President of the United States, by and with the advice and consent of the Senate thereof.”²⁰

¹⁸ *Tucker v. Alexandroff*, 183 U. S. 424, 22 Sup. Ct. 195, 46 L. Ed. 264.

¹⁹ 2 Phillimore, *Int. Law*, LXIV-XCIX.

²⁰ Treaty between United States and France, Feb. 10, 1903.

Similar provisions occur in many treaties negotiated since the First Hague Conference in 1899 and under the provisions of the Second Hague Conference of 1907.

MOST FAVORED NATION CLAUSE.

76. This is a clause inserted in many treaties, especially of a commercial nature, by which is granted to the parties advantages similarly conferred or which may be similarly conferred upon third powers.

Measures of reciprocity were taken in early international dealing. It was but natural that states which entered upon negotiations with a state should desire to obtain from that state, not only all the privileges which other states already possessed as a result of negotiations, but also the advantages which other states might subsequently acquire. To provide for this, clauses were introduced, varying in form, but to the effect that the parties to the treaty should receive all the privileges and immunities accorded to any nation whatsoever in the matters specified. Toward the end of the seventeenth century the expression "most favored nation" came into use. These treaties did not relate to commercial affairs only, but often to political matters.²¹ During the eighteenth century the "most favored nation" clause appeared in many commercial treaties.

In the treaty of amity and commerce negotiated between the United States and France, February 6, 1778, the general form of the "most favored nation" clause appears:

"Article IV. The subjects, people, and inhabitants of the said United States, and each of them, shall not pay in the ports, havens, roads, isles, cities, and places under the domination of His Most Christian Majesty, in Europe, any other or greater duties or imposts, of what nature soever they may be, or by what name soever called, than those which the most favored nations are or shall be obliged to pay; and they shall enjoy all the rights, liberties, privileges, immunities, and exemptions in trade, navigation, and commerce, whether in passing from one port in the said dominions, in Europe, to another, or in going

²¹ Cavaretta, *La Clausola della Nazione piu Favorita*, p. 59.

to and from the same, from and to any part of the world, which the said nations do or shall enjoy."

In the same treaty there appears a restriction to the effect that favors may be in return for equal concessions:

"Article II. The Most Christian King and the United States engage mutually not to grant any particular favor to other nations, in respect of commerce and navigation, which shall not immediately become common to the other party, who shall enjoy the same favor, freely, if the concession was freely made, or on allowing the same compensation, if the concession was conditional."

The form used in article II of this treaty has been used in many other treaties to which the United States has been a party. The United States has interpreted the "most favored nation" clause as aiming at equality of treatment. In commercial matters the following rule of interpretation was given in 1898:

"It is clearly evident that the object sought in all the varying forms of expression is equality of international treatment, protection against the willful preference of the commercial interests of one nation over another. But the allowance of the same privileges, and the same sacrifice of revenue duties, to a nation which makes no compensation, that had been conceded to another nation for an adequate compensation, instead of maintaining, destroys that equality of market privileges which the 'most favored nation' clause was intended to secure. It concedes for nothing to one friendly nation what the other gets only for a price. It would thus become the source of international inequality and provoke international hostility.

"The neighborhood of nations, their border interests, their differences of climate, soil, and production, their respective capacity for manufacture, their widely different demands for consumption, the magnitude of the reciprocal markets, are so many conditions which require special treatment. No general tariff can satisfy such demands. It would require a certainty of language which excludes the possibility of doubt to justify the opinion that the government of any commercial nation had annulled its natural right to meet these special conditions by compensatory concessions, or held the right only on condition of extending the same to a nation which had no compensation

to offer. The fact that such concessions, if made, would inevitably inure to the equal benefit of a third competitor, would often destroy the motive for, as well as the value of, such reciprocal concessions.

"But, instead of such certainty of expression, one of the articles in each of the treaties referred to contains a distinct recognition that special and compensatory commercial arrangements may be made, notwithstanding the 'most favored nation' clause, and provides that in such cases the favors granted shall be enjoyed by the party claiming favored nation treatment—gratuitously, if so granted; for equivalent compensation, if granted for a price.

"What will be an equivalent compensation is to be honorably determined by the governments concerned. So many considerations have necessarily entered into such special concessionary agreements that no universal rule can be applied. The price has often been special privileges in the market of the other for certain manufactures or products of the contracting country; but it may also be a port, a bay, or an island, or a protectorate, as well as an expanded market, or a privileged export trade. It may be anything within the range of the treaty-making power."²²

Certain other states, including Great Britain, have contended that the "most favored nation" clause should be absolute and unconditional in all cases, and that a favor granted to one state should extend immediately to all other nations having "most favored nation" treaties with that state.²³

The "most favored nation" agreement in different treaties varies in form and in content. In treaties to which the United States is a party the agreement is not always uniform.

It may be a gratuitous conferring of privileges, it may be conditional, or it may depend upon like concessions on the part of the other nation. Reciprocity is frequently at the basis of this agreement, though it does not follow that the concessions stipulated for are equivalent. When privileges granted

²² 5 Moore, § 765, p. 278.

²³ 5 Moore, § 765. For discussion, see J. R. Herod, "Favored Nation Treatment"; Stanley K. Hornbeck "The Most-Favored Nation Clause in Commercial Relations"; Imperial Japanese Government v. P. & O. Co., [1895] A. C. 644.

under the "most favored nation clause" are in the nature of reciprocal concessions, as in fixing of taxes, rights of citizens, etc., other states can only claim such privileges under a "most favored nation clause" through the grant of similar concessions.²⁴

A "most favored nation clause" of a general nature appears in the treaty between the United States and Japan of November 22, 1894, by which nationals of the respective states "shall not be compelled, under any pretext whatsoever, to pay any charges or taxes other or higher than those that are, or may be, paid by native citizens or subjects, or citizens or subjects of the most favored nation."²⁵

TREATIES OF GUARANTY.

77. Treaties of guaranty are agreements through which one or more powers engage to maintain given conditions or rights.

Treaties of guaranty were particularly common in the nineteenth century. These treaties cover a wide range of subjects, such as the maintenance of neutrality, the maintenance of a particular form of government or a certain status quo, or the performance of a certain act.

The Act of Acknowledgment and Guaranty of the Perpetual Neutrality of Switzerland, and of the Inviolability of Its Territory, Paris, November 20, 1815, states that: "The powers who signed the declaration of the 20th March acknowledge, in the most formal manner, by the present act, that the neutrality and inviolability of Switzerland, and her independence of all foreign influence, enter into the true interests of the policy of

²⁴ This point was fully discussed in the controversy over the interpretation of the treaty of 1803 between the United States and France. France claimed all the privileges granted to any nation, whether or not in exchange for special concessions. The United States contended that "'a most favored nation clause' cannot be understood to mean that France should enjoy as a free gift that which is ceded to other nations for a full equivalent." 5 American State Papers, Foreign Relations, 152, ff. Herod, Favored Nation Treatment, cc. 3, 10.

²⁵ Article I.

the whole of Europe." By a declaration of April 6, 1886, Great Britain and the German Empire gave mutual guaranty to respect their spheres of influence in the Western Pacific. The agreement between Great Britain and Japan, signed at London, August 12, 1905, has for its object:

"(a) The consolidation and maintenance of the general peace in the regions of Eastern Asia and of India.

"(b) The preservation of the common interests of all powers in China, by insuring the independence and integrity of the Chinese Empire and the principle of equal opportunities for the commerce and industry of all nations in China.

"(c) The maintenance of the territorial rights of the high contracting parties in the regions of Eastern Asia and of India, and the defense of their special interests in the said regions."

These two states propose to secure these objects as follows:

"Article I. It is agreed that whenever in the opinion of either Great Britain or Japan any of the rights and interests referred to in the preamble of this agreement are in jeopardy, the two governments will communicate with one another fully and frankly and will consider in common the measures which should be taken to safeguard those menaced rights or interests.

"Art. II. If by reason of unprovoked attack or aggressive action, wherever arising, on the part of any other power or powers either contracting party should be involved in war in defense of its territorial rights or special interests mentioned in the preamble of this agreement, the other contracting party will at once come to the assistance of its ally and will conduct the war in common and make peace in mutual agreement with it."

A treaty of November 7, 1907, respecting the independence and territorial integrity of Norway, provides:

"Article 2. The German, French, British, and Russian governments recognize and undertake to respect the integrity of Norway.

"If the integrity of Norway is threatened or impaired by any power whatsoever, the German, French, British, and Russian governments undertake, on the receipt of a previous communication to this effect from the Norwegian government, to

afford to that government their support, by such means as may be deemed the most appropriate, with a view to safeguarding the integrity of Norway.”

OPERATION OF A TREATY.

78. A treaty, if ratified, is binding—

- (a) **Upon the states parties to it,**
- (b) **In general, from the date of a signing, and**
- (c) **Usually, regardless of changes in the form of government.**

(a) A treaty is essentially an agreement to which states are parties. Two states cannot properly make a treaty which will deprive a third state of its rights, though many treaties do affect the relations of third states. A treaty is not in itself binding upon the nationals of a state or upon its local officials, but must in general be made thus operative by municipal law. The Constitution of the United States provides that, in addition to the Constitution and laws in accord therewith, “all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land.”²⁶ The Supreme Court has said “that ‘a treaty may supersede a prior act of Congress, and an act of Congress supersede a prior treaty,’ is elementary.”²⁷ Thus in the United States a treaty

²⁶ Const. U. S. art. 6, § 2.

²⁷ Ward v. Race Horse, 163 U. S. 511, 16 Sup. Ct. 1076, 41 L. Ed. 244.

“The second section of the sixth article of the Constitution is: ‘This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.’ There is nothing in the language of this clause which enables us to say that in the case supposed the treaty, and not the act of Congress, is to afford the rule. Ordinarily treaties are not rules prescribed by sovereigns for the conduct of their subjects, but contracts by which they agree to regulate their own conduct. This provision of our Constitution has made treaties part of our municipal law; but it has not assigned to them any particular degree of authority in our municipal law, nor declared whether laws so enacted shall or shall not be paramount to laws otherwise enacted. No such declaration is made, even in respect to the Constitution itself. It is named in conjunction with treaties and acts of Congress as one

is by the fundamental law rendered operative to the same extent as an act of Congress, and in case of conflict would be interpreted in accord with the same principles as apply in cases of conflict in acts of Congress.

(b) A modern treaty usually contains an article specifying the date upon which it will become operative, and as between the states parties to it is, in absence of such specification, operative from the date of signing. The treaty concluded between the United States and Japan, November 22, 1894, contained the following: "This treaty shall go into operation on the 17th day of July, 1899."²⁸ Nationals of a state cannot in general be held to be bound by a treaty till it is made known by proclamation.

(c) The change in the form of government, as from one party to another, by the death of a sovereign, from a monarchy to a republic, is not considered as operating to terminate or modify the provisions of a treaty, unless the treaty is made

of the supreme laws, but no supremacy is in terms assigned to one over the other; and when it became necessary to determine whether an act of Congress repugnant to the Constitution could be deemed by the judicial power an operative law, the solution of the question was found by considering the nature and objects of each species of law, the authority from which it emanated, and the consequences of allowing or denying the paramount effect of the Constitution. It is only by a similar course of inquiry that we can determine the question now under consideration.

"In commencing this inquiry I think it material to observe that it is solely a question of municipal as distinguished from public law. The foreign sovereign between whom and the United States a treaty has been made has a right to expect and require its stipulations to be kept with scrupulous good faith; but through what internal arrangements this shall be done is exclusively for the consideration of the United States. Whether the treaty shall itself be the rule of action of the people as well as the government, whether the power to enforce and apply it shall reside in one department or another, neither the treaty itself nor any implication drawn from it gives him any right to inquire. If the people of the United States were to repeal so much of their Constitution as makes treaties part of their municipal law, no foreign sovereign with whom a treaty exists could justly complain, for it is not a matter with which he has any concern."

2 Curtis' U. S. Circuit Court Decis. 454.

²⁸ Article 19.

with reference to such a contingency. The state is regarded as a permanent entity, the organs of which may change, without modifying the relationships of states to one another.

TERMINATION OF TREATIES.

79. A treaty may expire in accord with the terms of the treaty agreement, or may be dissolved, may become void or voidable, or may be annulled.

While the terms of treaties or conventions may cease to be binding in many ways and for different causes, treaties or conventions most often expire in accord with the terms under which they are concluded. Many treaties are concluded for the performance of a specific object or to maintain a certain status for a definite time. Less formal agreements than treaties or conventions are often temporary in nature, and are regarded as at an end if there is not ample evidence that they are still binding. A common provision in modern treaties is that the treaty "shall remain in force until the expiration of one year from the day on which either of the contracting parties shall give notice of its intention to terminate the treaty." A convention for the payment of a certain sum of money, for the cession of a certain territory, or for similar purposes, would ordinarily come to an end by the fulfillment of its stipulations. In the treaty between Great Britain and the United States of November 19, 1794: "It is agreed that the first ten articles of this treaty shall be permanent, and that the subsequent articles, except the twelfth, shall be limited in their duration to twelve years." The date of the exchange of ratifications was fixed as the time when this treaty should become operative. Ratifications were exchanged October 28, 1795, and articles XI to XXVII, mainly relating to commercial relations, expired by their own limitation October 28, 1807.²⁹

²⁹ "Article XXVII. It is agreed that the first ten articles of this treaty shall be permanent, and that the subsequent articles, except the twelfth, shall be limited in their duration to twelve years, to be computed from the day on which the ratifications of this treaty shall be exchanged, but subject to this condition: That whereas the said twelfth article will expire, by the limitation therein contained,

A treaty whose conditions have not been fulfilled may be dissolved by mutual agreement, may be superseded by a new agreement upon the same subject, or an obligation under a treaty may terminate by the voluntary release of the debtor state from the obligation by the state in whose favor the obligation runs.

A treaty which has not come to an end in accord with its own provisions and has not been dissolved may be void, if it depends upon a condition which has ceased to exist, by the complete destruction of the thing which forms the object of the treaty, when its execution becomes impossible, or by declaration of war, which either suspends or entirely destroys its effect. Such conditions arise most often when a state which has been a party to a treaty ceases to exist, as when a state disappears through absorption in another state, through partition, or otherwise.

Of voidability of treaties Hall says: "The principle which has been mentioned as being a sufficient test of the existence of obligatory force or of the voidability of a treaty at a given moment may be stated as follows: Neither party to a contract can make its binding effect dependent at his will upon conditions other than those contemplated at the moment when the contract was entered into; and, on the other hand, a contract ceases to be binding so soon as anything which formed an implied condition of its obligatory force at the time of its conclusion is essentially altered. If this be true, and it will scarcely be contradicted, it is only necessary to determine under what implied conditions an international agreement is made. When these are found, the reasons for which a treaty may be de-

at the end of two years from the signing of the preliminary or other articles of peace, which shall terminate the present war in which His Majesty is engaged, it is agreed that proper measures shall by concert be taken for bringing the subject of that article into amicable treaty and discussion, so early before the expiration of the said term as that new arrangements on that head may by that time be perfected and ready to take place. But if it should unfortunately happen that His Majesty and the United States should not be able to agree on such new arrangements, in that case all the articles of this treaty, except the first ten, shall then cease and expire together." Treaty between United States and Great Britain, Nov. 19, 1794.

nounced or disregarded will also be found.”³⁰ A treaty is also naturally voidable, though not necessarily void, if concluded in excess of powers of the negotiators, *sub spe rati*; if concluded because of danger of personal violence to the negotiators, or through fraud; if its terms are inconsistent with the general principles of international law; if the performance of the provisions of the treaty would destroy the state itself, or deprive it of its essential attributes; or if the conditions under which the treaty is made become absolutely altered. The principle of *rebus sic stantibus* is held to be implied in all treaties, though in recent times it is clear that a change in conditions which would render a treaty voidable must be such as to be vital.

A treaty may be annulled, or may come to an end, when violated by a party to it, or when formally abrogated by one of the parties.³¹ The abrogation of a treaty by one party may not be acceptable to the other party and may be made the basis of claims. Treaties of commerce, alliance, navigation, etc., which relate exclusively to relations of peace, may be extinguished by the outbreak of war. Treaties which are of a permanent nature, such as treaties of boundary, etc., are considered as suspended during hostilities. In general, treaties made in contemplation of war may become operative upon the outbreak of hostilities, and can be annulled only by the method prescribed in the treaties themselves, or by a new treaty. The Spanish decree of April 23, 1898, declared that: “The state of war existing between Spain and the United States terminates the treaty of peace and friendship of the 27th October, 1795, the protocol of the 12th January, 1877, and all other agreements, compacts, and conventions that have been in force up to the present between the two countries.” The United States declined to consider treaty provisions made with reference to the existence of war “as abrogated by war.”³² The claim of the United States that all treaty stipulations were not abrogated

³⁰ Hall, *Int. Law* (5th Ed.) p. 351.

³¹ “It has been adjudged that Congress by legislation, and so far as the people and authorities of the United States are concerned, could abrogate a treaty made between this country and another country.” *La Abra Silver Mining Co. v. United States*, 175 U. S. 423, 20 Sup. Ct. 168, 44 L. Ed. 223.

³² *Foreign Relations U. S.*, 1898, p. 972.

seems to be sustained in article XXIX of the Treaty of Friendship and General Relations of July 3, 1902, which state that: "All treaties, agreements, conventions and contracts between the United States and Spain prior to the Treaty of Paris shall be expressly abrogated and annulled, with the exception of the treaty signed the seventeenth of February, 1834, between the two countries, for the settlement of claims between the United States of America and the government of His Catholic Majesty, which is continued in force by the present convention."

Among writers upon international law there is much difference of opinion in regard to the effect of war upon treaties between the belligerents. As certain relations between the belligerents are suspended, the treaty stipulations in accord with which such relations were maintained must necessarily cease to be operative. Better opinion now seems to hold that treaty stipulations which do not relate in any way to the war are merely suspended during war, and again become operative at its close, or so soon thereafter as is practicable. The copyright convention between the United States and Spain of July 10, 1895, was regarded as suspended during the war of 1898, and as revived by the ratification of peace, April 11, 1899.

CONTINUATION OF TREATIES.

80. Treaties may be continued in effect by renewal, by reconfirmation, or otherwise, when there is ample evidence that the parties intend that the treaty shall remain operative.

Certain treaties and conventions are continued in accord with their own stipulations, unless denounced; others terminate at a specified time, unless renewed. Treaties of the first class may thus be renewed without action, while treaties of the second class require action for renewal. Treaties and conventions of this second class frequently relate to matters of temporary nature, as the adjustment of claims, boundaries, disputes, etc., or the establishment of *modi vivendi*. Treaties terminated or suspended by war are usually renewed in a formal manner. Treaties are sometimes regarded as tacitly

renewed, when the parties continue to observe their provisions, even after the time of expiration.

Sometimes the provisions of a previous treaty are reconfirmed, as in the treaty between France and Spain, October 1, 1800, relating to the recession of Louisiana: "The obligations contained in the present treaty in nothing annul those which are expressed in the treaty of alliance signed at St. Ildefonso, on the 2d Fructidor, year 4 (18th of August, 1796); on the contrary, they unite with new ties the interests of the two powers, and confirm the stipulations of the treaty of alliance in all the cases to which they can be applied."

Treaties and conventions may be tacitly considered as binding, though they may have expired by limitation. The Hague Declaration as to the Launching of Projectiles and Explosives from Balloons expired July 29, 1904, during the Russo-Japanese war. Both Russia and Japan continued to observe the treaty throughout the war.

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PART IV

INTERNATIONAL DIFFERENCES

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CHAPTER VIII.

AMICABLE MEANS OF SETTLEMENT OF INTERNATIONAL DIFFERENCES.

- 81. Nature of International Differences.
- 82. Negotiation.
- 83. Good Offices and Mediation.
- 84. Commissions of Inquiry.
- 85. Arbitration.
- 86. Award.

NATURE OF INTERNATIONAL DIFFERENCES.

81. In general, international differences are either legal or political in nature.

Legal differences between states may arise in consequence of views as to the construction of treaties or other agreements, or through conflicts involving principles of international law.

Political differences usually involve conflict of public interests or national policy.

It is not in practice always possible to separate the legal and political, and it is usually possible to find a legal ground upon which to advance a political claim, if a cause for disagreement is sought by a state.

In general, however, legal differences are more easily settled by amicable or judicial methods, while political differences often lead to some use of force.

The amicable means of settlement of international differences include negotiation, good offices, commissions of inquiry, arbitration, and congresses and conferences. The non-amicable means of redress short of war include breaking of diplomatic relations, retorsion, reprisal, of which embargo is a form, non-intercourse, display or restricted use of force, including pacific blockade, and intervention.

NEGOTIATION.

82. Negotiation through the regular interstate agents is the customary method of settling differences between states.

The procedure in case of negotiation is ordinarily as follows: One state presents its claim; the other replies; if there is then disagreement, a conference or an exchange of communications ensues, and agreement is reached. In some instances claims, particularly of a financial nature, have been the subject of diplomatic negotiation for many years. The "Mora claim," made by the United States against Spain in behalf of a naturalized citizen whose property had been confiscated in Havana in 1870, was the subject of much negotiation for twenty-five years, until settled by the payment of \$1,500,000.¹

GOOD OFFICES AND MEDIATION.

83. The part of a state tendering good offices or mediation "consists in reconciling the opposing claims and appeasing the feelings of resentment which may have arisen between the states at variance,"²

At the Second Hague Conference in 1907, the states of the world agreed, by a convention generally signed, "in case of serious disagreement or dispute, before an appeal to arms, * * * to have recourse so far as circumstances allow to good offices or mediation of one or more friendly powers."³ Third powers have the right to offer mediation, and it shall be regarded as a friendly act. The functions of a mediator end when either party declines mediation, and mediation is in all cases in the nature of advice, and the parties at difference are not bound to accept it or to suspend preparations for or operations of war through the acceptance of mediation.⁴

¹ Foreign Relations U. S. 1895, p. 1171.

² Convention for Pacific Settlement of International Disputes, The Hague, 1907, art. 4, Appendix, p. 520.

³ Id. art. 2, Appendix, p. 520.

⁴ Id. title II, contains general provisions in regard to good offices and mediation.

Since 1850 mediation or good offices have been tendered by the United States in many instances of disputes between South American states and the proffer has often been accepted. Similarly states have tendered good offices in most cases where the relations of states have become seriously strained in recent years.

On June 8, 1905, President Roosevelt tendered his good offices to the Russian and Japanese governments with a view to terminating the war between those two states. Identical dispatches were sent to the two governments as follows:

"The President feels that the time has come when, in the interest of all mankind, he must endeavor to see if it is not possible to bring to an end the terrible and lamentable conflict now being waged. With both Russia and Japan the United States has inherited ties of friendship and good will. It hopes for the prosperity and welfare of each, and it feels that the progress of the world is set back by the war between these two great nations. The President accordingly urges the Russian and Japanese governments, not only for their own sakes, but in the interest of the whole civilized world, to open direct negotiations for peace with one another. The President suggests that these peace negotiations be conducted directly and exclusively between the belligerents—in other words, that there may be a meeting of Russian and Japanese plenipotentiaries or delegates without any intermediary, in order to see if it is not possible for these representatives of the two powers to agree to terms of peace. The President earnestly asks that the Russian government do now agree to such meeting, and is asking the Japanese government likewise to agree. While the President does not feel that any intermediary should be called in in respect to the peace negotiations themselves, he is entirely willing to do what he properly can, if the two powers concerned feel that his services will be of aid in arranging the preliminaries as to the time and place of meeting; but if even these preliminaries can be arranged directly between the two powers, or in any other way, the President will be glad, as his sole purpose is to bring about a meeting which the whole civilized world will pray may result in peace."

The good offices of the President were accepted, and the

representatives of Russia and Japan met in the United States and concluded a treaty of peace at Portsmouth, N. H., September 5, 1905.

COMMISSIONS OF INQUIRY.

84. The Hague Conference of 1899 provided for commissions of inquiry to facilitate the solution of disputes by elucidating the facts by means of an impartial and conscientious investigation in cases of differences of an international nature involving neither honor nor vital interests and arising from difference of opinion on points of fact.

The provisions of the First Hague Conference were elaborated by the Second Hague Conference, and the procedure was more fully prescribed. The six articles of the First Hague Convention of 1899 were superseded by twenty-eight in the Second Hague Convention of 1907.⁵ The commission of inquiry is constituted by agreement of the parties at variance; but its report is to be limited to a statement of facts and is not in the character of an award.

The International Commission of Inquiry into the North Sea Incident (Dogger Bank Affair), constituted by agreement between Great Britain and Russia, was made up of five naval officers, one each from the British, Russian, French, and American navies, and a fifth chosen by the four. By the declaration of reference, signed at St. Petersburg, November 25, 1904, "the Commission shall inquire into and report on all the circumstances relative to the North Sea incident, and particularly on the question as to where the responsibility lies, and the degree of blame attaching to the subjects of the two high contracting parties, or to the subjects of other countries in the event of their responsibility being established by the inquiry." The Commission met in Paris on January 9, 1905, and rendered its report February 25, 1905. The Commission inquired into the location of responsibility and degree of blame in the firing by the Russian fleet upon the British trawlers in the North Sea. In article XI of the report "the majority of the commissioners express the opinion on this subject that the responsibil-

⁵ Id. title III.

ity for this action and the results of the fire to which the fishing fleet was exposed are to be attributed to Admiral Rojdestvensky." The North Sea incident was closed by the payment of £65,000 by Russia to Great Britain on March 9, 1905, as indemnity and compensation to the British fishermen.⁶ Thus at a period of strained international relations the value of this provision for a commission of inquiry was established.

ARBITRATION.

85. "International arbitration has for its object the settlement of disputes between states by judges of their own choice and on the basis of respect for law.

"Recourse to arbitration implies an engagement to submit in good faith to the award." ⁷

Historical.

(a) The Greeks seem to have been accustomed to the idea of arbitration in cases relating to commerce, boundaries, and other territorial questions. Rome preferred to act as arbitrator among subject peoples. With the growth of the power of the church in the Middle Ages, the high church officials were often called upon to act as arbitrators; but from the fourteenth to the nineteenth century arbitrations became less frequent, and the idea had little place in the political thinking of the days of Napoleon.

Among the Greeks the decision of the arbitrators carried weight, sometimes because coming from the Amphictyonic Council, sometimes because rendered by a tribunal upon which the disputants had agreed. The decision by Rome carried weight, because Rome possessed the power to enforce her decision. The decision by an authority of the church of the Middle Ages carried the weight of the authority which claimed to be highest in the world, and the dread of excommunication often deterred a dissatisfied party from questioning the award. In the centuries following the Middle Ages, with the growth of the idea of the equality and sovereignty of states, the idea

⁶ See Foreign Relations U. S. 1904, pp. 342, 796; Id. 1905, p. 473; British Parliamentary Papers, Russia No. 2 (1905); Id. No. 3 (1905).

⁷ Convention for Pacific Settlement of International Disputes, The Hague, 1907, art. XXXVII, Appendix, p. 524.

of arbitration among states naturally received little consideration, and those who proposed it were long regarded as theorists.

In the nineteenth century the resort to arbitration as a means of settling international differences seems at first to have been a matter of convenience or of expediency. Gradually the value of such a practice seems to have been recognized. During the nineteenth century provision for arbitration was more and more frequent in treaty stipulation. In the treaty of Guadalupe Hidalgo of 1848 between the United States and Mexico an article contains an agreement for arbitration "with respect to the interpretation of any stipulation of this treaty, or with respect to any other particular concerning the political or commercial relations of the two nations."⁸ With the increasing cost of war and the greater risks, it has secured support as a policy, and it was formally proposed as a subject for discussion for the First Peace Conference at The Hague, 1899, "with the object of preventing armed conflicts between nations." The results of this discussion of the subject of international arbitration at The Hague in 1899 have been far reaching and the progress of the movement for international arbitration has been very great.

⁸ "Article XXI. If unhappily any disagreement should hereafter arise between the governments of the two republics, whether with respect to the interpretation of any stipulation in this treaty, or with respect to any other particular concerning the political or commercial relations of the two nations, the said governments, in the name of those nations, do promise to each other, that they will endeavor, in the most sincere and earnest manner, to settle the differences so arising, and to preserve the state of peace and friendship in which the two countries are now placing themselves; using, for this end, mutual representations and pacific negotiations. And if, by these means, they should not be enabled to come to an agreement, a resort shall not, on this account, be had to reprisals, aggression or hostility of any kind, by the one republic against the other, until the government of that which deems itself aggrieved shall have maturely considered, in the spirit of peace and good neighborhood, whether it would not be better that such difference should be settled by the arbitration of commissioners appointed on each side, or by that of a friendly nation. And should such course be proposed by either party, it shall be acceded to by the other, unless deemed by it altogether incompatible with the nature of the difference, or the circumstances of the case."

Convention of 1907.

(b) The forty-three articles especially relating to international arbitration in the Hague Convention for the Pacific Settlement of International Disputes of 1899 were elaborated and expanded to fifty-four in the corresponding Hague Convention of 1907. The aim of this convention, which replaces that of 1899, is to make arbitration as widely applicable as possible.

It is recognized by this Convention that arbitration is particularly applicable to international questions of a legal nature, especially to differences arising in regard to the interpretation of treaties. Its scope is made comprehensive, and powers may by special agreements make arbitration compulsory for any or all cases.

A Permanent Court to sit at The Hague, competent for all cases, is established. Each contracting power is entitled to select four persons "of known competency in questions of international law" as members of the court. Two or more powers may select "in common one or more members." Contracting powers wishing to have recourse to the court may agree upon the arbitrators, or, failing this, each party may appoint two arbitrators, and these may together agree upon an umpire. If they fail to agree, the two powers may ask a third power to name an umpire, or each power may select a power to represent it in the choice of an umpire. If within two months these powers cannot agree, then each power names two candidates, and which shall serve as umpire is determined by lot.

The members of the tribunal thus established enjoy diplomatic immunities.

The procedure, unless other rules have been agreed upon, is to clearly define the controversy and other necessary details in a "compromis." This compromis, if made by mutual agreement, is signed by the parties. If the parties wish, the Permanent Court may settle the compromis. If an agreement upon a compromis cannot be reached by the parties, one of them may request the court to formulate the compromis in cases provided for by treaty. The procedure generally consists of pleadings, or the presentation of the cases, counter cases, and replies, and of discussions, or the oral development of the arguments be-

fore the tribunal. Provision is made for the utmost freedom in obtaining the most adequate information upon the case.

"The tribunal considers its decisions in private and the proceedings remain secret." A majority decides.

Arbitration by Summary Procedure.

(c) A new provision is made in the Convention of 1907 for arbitration by summary procedure. Under this system, in disputes admitting this method, each disputant chooses one arbitrator, these agree upon an umpire, or, failing to agree, each party names two candidates, not being members appointed by them or their nationals, and from these an umpire is chosen by lot. Each party is represented before the tribunal by an agent. Proceedings are in writing. Each party is entitled to ask questions and to call experts. The tribunal may demand oral explanations from agents, experts, or witnesses. The umpire presides over the tribunal, and decision is by majority of votes.⁹

By article XL (article XIX of the Convention of 1899) provision is made for special treaties between states extending compulsory arbitration to all cases which they may consider possible. The United States has concluded a large number of treaties since 1907, including the following articles:

"Article I. Differences which may arise of a legal nature or relating to the interpretation of treaties existing between the two contracting parties, and which it may not have been possible to settle by diplomacy, shall be referred to the Permanent Court of Arbitration established at The Hague by the Convention of July 29, 1899, provided, nevertheless, that they do not affect the vital interests, the independence, or the honor of the two contracting states, and do not concern the interests of third parties.

"Article II. In each individual case the high contracting parties, before appealing to the Permanent Court of Arbitration, shall conclude special agreement defining clearly the matter in dispute, the scope of the powers of the arbitrators, and the periods to be fixed for the formation of the arbitral tribunal,

⁹ Convention for Pacific Settlement of International Disputes, The Hague, 1907, title IV, §§ XXXVII-XC.

and the several stages of the procedure. It is understood that on the part of the United States such special agreements will be made by the President of the United States by and with the advice and consent of the Senate thereof."

Grotius in 1625 favored compulsory arbitration, and set forth various arguments, particularly emphasizing the religious. He said: "And both for this and for other reasons it would be useful, and in fact almost necessary, that congresses of the Christian powers should be held where controversies arising among some of them may be adjusted by those who have no interest in the controversy and where measures may be taken to compel the parties to accept a peaceful settlement on equitable terms."¹⁰ Many plans were proposed in the centuries after Grotius, but the working out of the system of compulsory arbitration in detail seems to be left for the twentieth century.

Court of Arbitral Justice.

(d) At the Second Hague Convention of 1907 it was proposed to establish a Court of Arbitral Justice, which should be "competent to deal with all cases submitted to it, in virtue either of a general undertaking to have recourse to arbitration or of a special agreement." It was the plan to constitute an international court whose judges should represent the different legal systems of the world, a court which should be continuously in session, free and easy of access, and essentially judicial in nature. It was hoped that its decisions would be based on legal grounds, rather than upon the mixed motives which generally influence decisions by arbitrations. It was not found possible to agree upon the method of appointment of judges. Secretary Knox, in an identic note of October 18, 1909, suggested to the powers the propriety of investing the International Prize Court with the functions of a court of arbitral justice, maintaining that:

"The proposal of the United States does not involve the modification either of the letter or spirit of the draft convention, nor would it require a change in wording of any of its articles. It would, however, secure the establishment of the

¹⁰ Grotius, *De Jure Belli ac Pacis*, lib. II, cap. XXIII, VIII, 4.

Court of Arbitral Justice as a chamber of the world's first international judiciary, and thus complete through diplomatic channels the work of the Second Hague Conference by giving full effect to its first recommendation.

"In proposing this solution of the difficulty the United States is influenced by daily practice and procedure in its national courts of justice, where one and the same judge administers law and equity, admiralty and prize, which, under its system of procedure, are different systems of law."¹¹

The establishment of this court, which aims to insure "continuity in the jurisprudence of arbitration," may be a step toward the establishment of an international court of justice, the decisions of which would be judicial, rather than arbitral.

Conclusion.

(e) The resort to arbitration as a means of settling international differences has become frequent in recent years. La Fontaine enumerates 177 cases from 1794 to the end of 1900. The decisions in these cases, prior to the adoption of the Hague Conventions, were almost invariably accepted.¹² With the growing sentiment favorable to arbitration, resort to this method of settling disputes is becoming more frequent, and it may be safe to say that with the present provisions for an impartial court the decisions will require no further sanction to render them at once effective. Since the United States and Mexico presented the first case, that of the Pius Fund, to the Hague Court in 1902, doubts as to the future of the court, which had prevailed in some quarters, have been dispelled, and cases of the utmost gravity have been submitted to its arbitration.¹³

¹¹ 4 A. J. I. Doc. p. 111; Draft Convention of Court of Arbitral Justice, Appendix, p. 568.

¹² IV *Revue de Droit Int. et de Legislation Comparée*, 2d Series, p. 349 et seq.

¹³ For cases and history of arbitration, see Moore, *History and Digest of the International Arbitrations to Which the United States has been a Party*, 6 vols.

SAME—AWARD.

- 86. The Hague Convention of 1907 provides that "the award, duly pronounced and notified to agents of the parties, settles the dispute definitively and without appeal," unless the parties reserve in the "compromis" the right within a fixed time to demand revision of the award.¹⁴**

There were formerly many opinions as to the reasons which would justify the setting aside of an arbitral award. The Hague Convention on the Pacific Settlement of International Disputes, 1907, tries to make the award binding. The award is to be signed by the president and registrar of the tribunal, to give the reasons upon which it is based, and to be "read out" to the agents and counsel of the parties. In case of dispute upon the terms of the award, it is to be referred to the tribunal which pronounced it. A "compromis," agreed upon by the parties, may provide for revision of the decision on the ground of new evidence. The award is not necessarily binding on third parties.

The first award rendered by the Permanent Court of Arbitration at The Hague was in regard to the Pius Fund of the Californias. The case was submitted to the tribunal by the United States and Mexico under the protocol of May 22, 1902. The award pronouncing that Mexico should pay to the United States "the sum of \$1,420,687.67 Mexican" and "the annuity of \$43,050.99 Mexican" was given on October 22, 1902.¹⁵

Awards made by arbitrators after the parties have agreed to abide by the decision are final,¹⁶ provided the decision is not based on fraud.¹⁷ The award made by the umpire in the mixed commission under the convention of July 4, 1868, between the United States and Mexico in favor of Benjamin Weil, a naturalized citizen of the United States, for cotton seized by Mexican troops, and for seizure of property

¹⁴ Convention for the Pacific Settlement of International Disputes, The Hague, 1907, articles LXXX–LXXXV, Appendix, p. 531.

¹⁵ The Pius Fund of the Californias, Foreign Relations U. S. 1902, Appendix II.

¹⁶ *La Ninfa* (1896) 21 C. C. A. 434, 75 Fed. 513.

¹⁷ 2 Moore, International Arbitrations, 1659.

of La Abra Silver Mining Company was considered by Mexico to be open to suspicion of perjury and fraud. Mexico paid installments under the award. The United States government withheld certain of these payments from distribution to the claimants. One of the claimants instituted a suit to compel distribution of the installments. The Supreme Court said: "The presentation by a citizen of a fraudulent claim or false testimony for reference to the commission was an imposition on his own government; and, if that government afterwards discovered that it had in this way been made an instrument of wrong towards a friendly power, it would be not only its right, but its duty, to repudiate the act and make reparation as far as possible for the consequences of its neglect, if any there had been. International arbitration must always proceed on the highest principles of national honor and integrity. Claims presented and evidence submitted to such a tribunal must necessarily bear the impress of the entire good faith of the government from which they come, and it is not to be presumed that any government will for a moment allow itself knowingly to be made the instrument of wrong in any such proceeding."¹⁸ This award, after further investigation and litigation, was found to be based upon fraudulent evidence,¹⁹ and the United States not only returned to Mexico the undistributed balances of the installments withheld,²⁰ but Congress in 1902 appropriated \$412,570.70 to repay Mexico for the installments already received and distributed by the United States.²¹

An award made without due regard to the limitations set forth in the agreement between the parties may be set aside on the ground that an arbitrator cannot bind the governments concerned in respect to matters not submitted for decision.²²

¹⁸ *Frelinghuysen v. Key*, 110 U. S. 63, 3 Sup. Ct. 462, 28 L. Ed. 71.

¹⁹ *La Abra Silver Mining Co. v. United States*, 175 U. S. 423, 20 Sup. Ct. 168, 44 L. Ed. 223.

²⁰ *Foreign Relations U. S. 1900*, pp. 781-784.

²¹ 32 Stat. 5.

²² *North American Commercial Co. v. United States*, 171 U. S. 110, 18 Sup. Ct. 817, 43 L. Ed. 98.

CHAPTER IX.

NON-AMICABLE MEASURES OF REDRESS SHORT OF WAR.

- 87. Non-Amicable Measures of Redress.
- 88. Breaking of Diplomatic Relations.
- 89. Retorsion.
- 90. Reprisals.
- 91. Embargo.
- 92. Non-Intercourse.
- 93. Display or Restricted Use of Force.
- 94. Pacific Blockade.

NON-AMICABLE MEASURES OF REDRESS SHORT
OF WAR.

87. The measures, short of war, usually resorted to for securing redress, are:
- (a) Breaking of diplomatic relations.
 - (b) Retorsion.
 - (c) Reprisal.
 - (d) Embargo.
 - (e) Non-intercourse.
 - (f) Display or restricted use of force.
 - (g) Pacific blockade.

SAME—BREAKING OF DIPLOMATIC RELATIONS.

88. The breaking of diplomatic relations is an evidence of strained relations between states, and is often the step preceding war.

When one state has a difference with another, a common form of public protest is by severance of diplomatic relations. This may be by the delivery of his passport to the agent of the state against which the grievance lies, or by the recall or departure of the diplomatic agent of the injured state from the offending state. In the claims lodged by one state against another it is not always easy to distinguish the offending state from the offender; but the rupture of diplomatic relations by either party is an evidence that the relations between the states

are no longer entirely friendly, and that the party breaking these relations desires to emphasize the fact that it considers its rights infringed, denied, or imperiled. On April 20, 1898, the Spanish Minister to the United States sent the following communication to the Secretary of State:

"The resolution adopted by the Congress of the United States of America, and approved to-day by the President, is of such a nature that my continuance in Washington becomes impossible and obliges me to request of you the delivery of my passports.

"The protection of Spanish interests will be intrusted to the French Ambassador and to the Austro-Hungarian Minister."¹

On February 6, 1904, the Japanese Minister addressed a note to the Russian Minister of Foreign Affairs, which, after giving a résumé of the Japanese contentions, states that "the Imperial Government have no other alternative than to terminate present futile negotiations. In adopting that course the Imperial Government reserve to themselves the right to take such independent action as they may deem best to consolidate and defend their menaced position, as well as to protect their established rights and legitimate interests."²

After considerable negotiation in regard to the killing of certain Italians in New Orleans in 1891, the Italian government considered that the United States was not willing to grant sufficient satisfaction. Baron Fava, the Italian Minister to the United States, in a communication to the Secretary of State March 31, 1891, said: "Under these circumstances, the government of His Majesty, considering that the legitimate action of the King's minister at Washington becomes inefficacious, has ordered me to take my departure on leave."³

SAME—RETORSION.

89. Retorsion is a species of retaliation in kind. It usually consists in treating the subjects of the state giving cause for retaliation in a manner analogous, if not identical, with that accorded to the subjects of the state resorting to retorsion.

¹ Foreign Relations U. S. 1898, p. 765.

³ Id. 1891, p. 675.

² Id. 1904, p. 412, full text of note.

Certain acts which may be entirely within the legal competence of a state may place the subjects of another state under disabilities.⁴ In such cases protest is sometimes made by the other state by resort to identical or similar measures. The act of a state may be unfriendly, discourteous, or an unfair discrimination.

While an act at which retorsion is aimed may not be illegal, yet it may be such as to affect a state or its citizens in such manner as to require remedy. Just how far retorsion will be applied will be a matter of policy rather than law.

A state may restrict the action or privileges of certain foreigners sojourning or entering within its borders. The state whose nationals have been restrained may place similar restrictions on the action of the nationals of the first state, who in turn come within its borders. A state may place restrictions upon commerce and trade, which may be met with corresponding restrictions by other states. How far such restrictions may go is not a matter of law, but of political policy. The use of various means of retorsion has in recent years become common, particularly in commercial relations through tariffs or discriminating duties. When heavy duties have been placed on articles which are especially produced by one state, that state may resort to imposition of special duties or special restrictions upon articles produced by the state first levying heavy duties. This may lead the first state to impose still further restrictions, and the commercial relations between the two states may be interrupted or practically at an end.

Since the influence of those engaged in commerce and trade has in modern times had much weight with those in political power, retorsion, or the fear of retorsion, has frequently led to the repeal of objectionable legislation or prevented action which, while legal according to domestic law, would be unfair, would be discourteous, or would work undue hardship.

SAME—REPRISALS.

90. Reprisals consist in the adoption of measures of retaliation in order to obtain redress for action committed in violation of international right.

⁴ Heilborn, *Das System des Völkerrechts*, 352.

Retorsion is usually resorted to as a matter of political expediency, when by acts which may not be internationally illegal a state has conducted itself in an unfair manner toward another state or its citizens. Reprisals, on the other hand, attempt to secure remedy in case of international delinquency or injustice either toward a state or its citizens. Acts of reprisal may be of the same character as acts of war; but, as they are aimed to secure redress for a given act, they are not necessarily regarded as hostile. Reprisals may involve the seizure and confiscation of private property, and in extreme cases personal restraint, or compulsion commensurate with the injury done and sufficient to obtain reparation. Suspension of judicial, commercial, or other rights has been common. In early days letters of marque and reprisal were issued to private persons, in order that they might avenge supposed wrongs. The modern tendency has been to restrict the measures of reprisal more to the field of commercial intercourse. The range of action, however, still varies.

In 1887 the United States Congress passed an act empowering the President, in case the rights of United States fishermen were denied or abridged in Canadian waters, to deny Canadian vessels entrance to the waters of the United States, and also to deny entry to any or all Canadian products.⁵ France in 1901 seized the island of Mitylene in order to secure the recognition by Turkey of certain financial and other claims.

In December, 1908, the Netherlands ship of war *Gelderland* seized the Venezuelan coast guard ship *Alix* off the Venezuelan coast and took her to the near by Dutch port of Willemstad.

SAME—EMBARGO.

- 91. Embargo is a special form of reprisal, and consists in general in the sequestration of the public or private property of an offending state. It may sometimes be applied by a state to its own vessels.**

Embargo was formerly a common method of redress. If war followed before the embargo was raised, the detained

⁵ 24 Stat. 475 (U. S. Comp. St. 1901, p. 2785).

ships of the offending state were seized as prize. Otherwise they were released when the embargo was raised. The United States resorted to this means of redress in 1794, 1797, 1807, 1808, and 1812. An embargo, sometimes called civil or pacific, may by domestic law regulate the movements of the vessels belonging to a state, in order to prevent the seizure by another state, or in order to put other pressure upon an offending state.

With the growth of international commerce, it has now become common to allow innocent vessels of foreign states, even of enemy states, as large a degree of freedom as possible, even a certain number of "days of grace" for loading and departure on the outbreak of war.⁶

SAME—NON-INTERCOURSE.

92. Non-intercourse laws may, for the purpose of placing stress upon a state which is regarded as an offender, prohibit trade or other relations with its nationals.

Non-intercourse acts have often been associated with embargo acts, but are usually more general in character. The United States passed several non-intercourse acts in the late years of the eighteenth and in the early nineteenth century. Commercial intercourse with France was suspended by an act of Congress of June 13, 1798. Other acts of similar nature followed. The non-intercourse act of March 1, 1809, aimed at Great Britain, was broad in its provisions, and its enforcement created much friction. The irritation caused by embargo and non-intercourse acts is so great that these are now commonly regarded as impolitic methods of obtaining redress.

DISPLAY OR RESTRICTED USE OF FORCE.

93. The display of force as a form of constraint to insure observance of rights is sometimes resorted to where the course of justice is uncertain or the political conditions are disturbed. The force may be used to a limited degree without resorting to war.

⁶ Post, p. 289.

The display of force carries with it the intimation that the state making the display may use the force if its rights are not respected. In the report of the Secretary of State of the United States, December 19, 1895, in regard to disturbed conditions in the Turkish Empire it is said that: "The efforts of the minister have had the moral support of the presence of naval vessels of the United States on the Syrian and Adanan coasts from time to time as occasion required, and at the present time the San Francisco and Marblehead are about to be joined by the Minneapolis, which has lately been ordered to the eastern waters of the Mediterranean."⁷

In March, 1900, the diplomatic representatives in China, fearing a Boxer outbreak, asked their respective governments to make a naval demonstration in Chinese waters.⁸ A ship was detailed by the United States, according to telegram, "for independent protection of American citizens and interests in China." The display of force was not sufficient. The legations at Pekin were besieged and cut off from communication. Forces of the various nations were dispatched to their rescue, though there was no war.⁹ In the award of the Venezuelan Arbitration in 1903, preferential treatment was given to the powers which had resorted to hostile measures to enforce their claims.¹⁰

In many cases the display of force is merely to emphasize the urgency of the demand. Its use should be simply to preserve rights or to secure those already possessed. When this end is attained, all measures of redress should terminate. In the case of the display of force in 1902 in order to enforce claims against Venezuela, the powers concerned felt it necessary to pass beyond the measures short of war to actual war, though the hostilities were confined to a single object. The range of redress may thus pass from the simple show of force to the border line of war, or to actual war.

⁷ Foreign Relations U. S. 1895, p. 1257.

⁸ Id. 1900, p. 102.

⁹ Id. 1900, p. 102 et seq.

¹⁰ Penfield's Report, Venezuelan Arbitration, 1903, p. 110.

SAME—PACIFIC BLOCKADE.

94. A common form of restricted use of force consists in the establishment of what in time of war would constitute a blockade, without technically destroying the pacific relations of the parties affected.

Pacific blockade ordinarily takes the form of closing by force of one or more ports of a country in order to bring the country to terms. Strictly speaking, blockade is a war measure, and modern tendency has been in the direction of limiting blockade to the time of war.

This measure of enforcing demands by one or more nations was first resorted to in 1827, when France, Great Britain, and Russia blockaded all the coasts of Greece where Turkish armies were encamped. The three powers maintained that this was a pacific measure; but it resulted in the battle of Navarino, and the destruction of the Turkish navy.

The so-called "pacific blockades" established since 1827 have varied greatly in nature. These include: The blockade of the Tagus by France, 1831; Holland by Great Britain, 1833; New Granada by Great Britain, 1836; Mexico by France, 1838; La Plata by France, 1838–1840; Greece by Great Britain, 1850; Menam by France, 1883; Formosa by France, 1884; Greece by Five Great Powers, 1886; Zanzibar by Portugal, 1888; Greece by Six Great Powers, 1897; and Venezuela by Great Britain, Germany, and Italy, 1902. The number of cases during the nineteenth century was sufficient to establish the practice of using this method of constraint. Before 1850, it was claimed that ships of third states were bound to respect pacific blockades, and that they might be seized for attempting to violate the blockade, and might be detained without condemnation. Since that time the drift of opinion and practice has been toward the restriction of the effects of pacific blockade so far as possible to the blockading and blockaded parties. When France engaged in the blockade of Formosa in 1884, Lord Granville said: "The contention of the French government that a 'pacific blockade' confers on the blockading power the right to capture and condemn the

ships of third nations for a breach of such a blockade is in conflict with well-established principles of international law."¹¹ In 1897 the United States distinctly announced that it did not concede the right of the powers to establish without declaration of war a blockade of Crete which would affect third states.¹² The United States took the same position with reference to the attempt to extend to states not concerned the consequences of the so-called "pacific blockade" of Venezuela in 1902. While Germany was in favor of maintaining a pacific blockade, "Great Britain insisted that the blockade should be warlike in character," though at first these powers did not intend to declare war. Subsequently acknowledgment was made that a state of war actually existed, and on December 20, 1902, a proclamation of blockade was issued.¹³

The weight of authority is against the admission of a doctrine of pacific blockade which would affect third states not parties to the difficulties involved. Some authorities doubt the expediency of such a measure in any case.¹⁴ General opinion seems to be favorable to the toleration of this form of reprisal,

¹¹ British Parliamentary Papers, France No. 1 (1885), Letter of Nov. 11, 1884.

¹² Foreign Relations U. S. 1897, pp. 253-255; Id. 1898, p. 384.

¹³ Foreign Relations U. S. 1903, p. 417 et seq.

¹⁴ Bonfils says:

"The so-called pacific blockade cannot be justified, either in the name of humanity or from the point of view of good sense. The catastrophe of Navarino shows that it may have a bloody ending. In time of peace, reprisals ought to injure only the state which provokes them. The pacific blockade can produce serious results only when neutral states are obliged to respect it. But there can be no question of neutrality, properly so called, in time of peace. No obligation, in the proper and juridical sense, can oblige third states to submit to the conditions of a pacific blockade. But under these limitations the blockade has neither meaning nor value. If it is maintained with regard to third states, it injures their rights and legitimate interests.

"For powers of the first rank, the pacific blockade constitutes a means, little burdensome, therefore more alluring, of making states of the second rank to submit to all kinds of vexations and annoyances. At bottom it is simply an act of war, a fact of hostility. In resorting to pacific blockade, the powers do not endeavor to escape war itself, but only the inconveniences and main obligations which war brings. It is considerations of interest, and not considerations

provided its effects are strictly confined to the blockading and blockaded parties. Such limitation lessens the effectiveness of pacific blockade, which in early days was often an attempt to secure the advantages of war without its obligations. Sometimes resort to pacific blockade has averted severer measures. The name "pacific blockade" is contradictory in itself; but, if the measure is so guarded as not to operate as a war measure against third states, probably little objection will be raised, as the parties concerned have the option of regarding it as hostile if expedient for themselves, and third states should not ordinarily be concerned with measures of reprisal which do not interfere with their rights.¹⁵

of humanity, which urge maritime powers to resort to this means of constraint, which causes great losses to commerce in general."

Droit Int. Public (Fauchille's Ed.) §§ 992-993.

¹⁵ Hogan, A. E., *Pacific Blockade*, p. 70.



PART V
WAR

CHAPTER X.

NATURE AND COMMENCEMENT.

- 95. War Defined.
- 96. Kinds of War.
- 97. Object of War.
- 98. Commencement.
- 99. Declaration.
- 100. Date of Commencement.

WAR DEFINED.

95. Broadly defined, "war is a properly conducted contest of armed public forces,"¹ or the legal condition under which such contest would be authorized.

War implies the right of the parties legally to exercise force against one another. Grotius says that: "In treating of the law of war, we have to find out what is war, which is the subject under investigation; what the law, which is sought. Cicero called war a contention by force. Usage, however, holds that not the action, but the state, is indicated by the term 'war,' so that war is the condition of contention by force, as such."²

Later definitions tended to exclude private wars, which Grotius specifically states that he does not exclude. The earli-

¹ Gentilis, *De Jure Belli* (1588) bk. I, c. 2. "Bellum est publicorum armorum justa contentio."

Bluntschli, § 510: "La guerre est l'ensemble des actes par lesquels un état ou un peuple fait respecter ses droits, en luttant par les armes contre un autre état ou un autre peuple."

§ 511: "La guerre est, en règle générale une lutte armée entre divers états, à l'occasion d'une question de droit public."

3 Phillimore, *Int. Law*, 49: "War is the exercise of the international right of action, to which, from the nature of the thing and the absence of any common superior tribunal, nations are compelled to have recourse, in order to assert and vindicate their rights."

Vide 4 Calvo, *Droit Int.* p. 16, where will be found collected other definitions of war.

² Grotius, *De Jure Belli ac Pacis*, I, 1, 2; Bynkershoek, *De Rebus Bellicis*, I, 1.

er definition of Gentilis, that "war is a properly conducted contest of armed public forces," has come to be generally accepted for the period of actual hostilities.³

Dr. Lieber, in 1863, in the Instructions for the Government of Armies of the United States in the Field, stated:

"20. Public war is a state of armed hostility between sovereign nations or governments. It is a law and requisite of civilized existence that men live in political, continuous societies, forming organized units, called states or nations, whose constituents bear, enjoy, and suffer, advance and retrograde, together, in peace and in war."

"25. In modern regular wars of the Europeans, and their descendants in other portions of the globe, protection of the inoffensive citizen of the hostile country is the rule; privation and disturbance of private relations are the exceptions."⁴

There may be a use of force by one state against another without a state of war, as in the case of reprisals or the use of force to protect national interests. Conceivably there may be a state of war without the use of force, if a state should declare war against another state, and, before an actual engagement of the forces had occurred, difficulties should be satisfactorily adjusted and peace should be restored.

To protect the rights of all, it is most essential to know when a state of war exists, while the question whether any engagement of the forces has taken place may be of little interest, except from a military point of view. The existence of a state of war, whether or not force is actually used, entails obligations upon neutrals and gives belligerents rights which do not exist in time of peace. To make clear the time at which the rights and obligations consequent upon a state of war arise, it is now common, and by the Hague Convention of 1907 obligatory, to issue a declaration of war.

³ See Note 1 above.

⁴ Appendix, p. 491.

KINDS OF WAR.

96. Wars are variously classified according to the purpose of the classification:

- (a) For descriptive purposes, as offensive or defensive; as public, private, or mixed wars; as religious, political, etc.; as international or civil.**
- (b) For purposes of international law, as war in the material sense, or as war in the legal sense.**

(a) It is very difficult to distinguish in fact an offensive war from a defensive. Prompt action on the offensive may be the most effective defense. The classifications of wars sometimes given in early treatises as public or private, religious or political, etc., easily become confused and are of little value.

(b) The distinction between war in the material sense⁵ and war in the legal sense⁶ is frequently recognized in practice particularly in cases of insurrection, in distinction from war between states. The political department of the government may defer recognition of a fact of which the military department is obliged to take cognizance. If a state is in danger, it is the business of the military forces to afford protection. The commander in chief may call upon the military forces to perform service in behalf of the state, while the right to declare war may be, as in the United States, a function of another branch of government.

⁵ There are many grades of conflict. At a point between the struggle of state with state and of individual with individual, there is a form of struggle, varying according to circumstances, but usually an armed struggle between two organized groups or parties within a state for public political ends, which is called "insurgency." The party opposing that in possession of the existing state organization is usually regarded as rebelling against the state, and is called "insurgent." Wilson, *Insurgency*, U. S. Naval War College Publications, 1901; Rougier, *Guerres Civiles et le Droit des Gens*, 17; *The Three Friends*, 166 U. S. 1, 17 Sup. Ct. 495, 41 L. Ed. 897; *Underhill v. Hernandez*, 168 U. S. 250, 18 Sup. Ct. 83, 42 L. Ed. 456.

For definition of other classes of war, vide 1 Halleck, *Int. Law*, c. 16; Calvo, *Droit Int.* §§ 1866-1884, inclusive.

⁶ The existence of war in the legal sense is determined by the political department of the government. *The Pedro*, 175 U. S. 354, 20 Sup. Ct. 138, 44 L. Ed. 195; *The Buena Ventura*, 175 U. S. 384, 20 Sup. Ct. 148, 44 L. Ed. 206.

While the Hague Convention Relative to the Opening of Hostilities provides that hostilities should not take place without previous declaration, the convention is binding only upon signatory powers. In case of a revolution within the territory of a signatory state, the established state would ordinarily be reluctant to declare war, as this would give full belligerent status to the revolutionary party. It may be necessary for a state whose interests are involved, because of proximity or from other reasons, to recognize that war in the material sense actually exists.

OBJECT OF WAR.

97. The object of war may be considered from two points of view:

- (a) From the political point of view, the object is to attain the end of the state.**
- (b) From the military point of view, the object is to secure the submission of the enemy.**
- (c) By the Hague Convention of 1907 the use of force for the recovery of contract debts is in general prohibited.**

(a) The political object of the war may vary widely in character, and may change with the progress of the hostilities. A war undertaken for the defense of a state may be continued to secure indemnity.

(b) The military object of the war is to secure the submission of the enemy with the least possible sacrifice of life and property.

(c) In a communication of the Foreign Minister of the Argentine Republic, Mr. Drago, transmitted to the Department of State of the United States in 1902, a protest was made against the use of force for the collection of contract debts.⁷ This question became one for consideration of the Second Hague Peace Conference in 1907, and the Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts provided:

"Article I. The contracting powers agree not to have recourse to armed force for the recovery of contract debts claim-

⁷ Foreign Relations U. S. 1902, p. 7.

ed from the government of one country by the government of another country as being due to its nationals.

"This undertaking is, however, not applicable when the debtor state refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any 'compromis' from being agreed on, or, after the arbitration, fails to submit to the award."

COMMENCEMENT OF WAR.

98. (a) War in the material sense may commence without previous declaration.

(b) War in the legal sense should not commence without previous declaration.

(a) The existence of war in the material sense is evident in the use of force by the parties, provided it amounts to a public armed contest.

Hall states the opinion commonly held at the end of the nineteenth century: "On the threshold of the special laws of war lies the question whether, when a cause of war has arisen, and when the duty of endeavoring to preserve peace by all reasonable means has been satisfied, the right to commence hostilities immediately accrues, or whether it is necessary to give some preliminary notice of intention. A priori it might hardly be expected that any doubt could be felt in the matter. An act of hostility, unless it be done in the urgency of self-preservation or by way of reprisal, is in itself a full declaration of intention. Any sort of previous declaration, therefore, is an empty formality, unless an enemy must be given time and opportunity to put himself in a state of defense; and it is needless to say that no one asserts such quixotism to be obligatory."

(b) Formerly war in the legal sense might begin without declaration, and most of the wars in the eighteenth and nineteenth centuries began without declaration.

Of the 143 wars between the years 1700 and 1900 there seem to have been only about 20 formal declarations, and most of these were subsequent to the actual commencement of hostilities. In a few cases war followed an ultimatum. In

certain instances the relations between the states were so strained that war was the natural sequence. In wars with savages, uncivilized peoples, insurgents, or revolutionists, there have been conditions which made declaration unnecessary.

DECLARATION OF WAR.

99. A declaration of war is now in general required before the opening of hostilities between states.

In early days wars were commenced with great formality, a herald often proceeding to the frontier and making formal announcement and receiving formal reply. The early practice is set forth in Deuteronomy, xx, as follows:

"10. When thou comest nigh unto a city to fight against it, then proclaim peace unto it.

"11. And it shall be, if it make thee answer of peace, and open unto thee, then it shall be, that all the people that is found therein shall be tributaries unto thee, and they shall serve thee.

"12. And if it will make no peace with thee, but will make war against thee, then thou shalt besiege it."

For many centuries the formal declaration of war was intrusted to the priestly class. Such declarations were made prior to the opening of hostilities. This custom was common among the Greeks and Romans.⁸ Among the Romans in the early times thirty-one days were allowed in which the offending state might render satisfaction. The constitution of Frederick Barbarosa of 1187 granted three days' notice of hostilities. Letters of defiance were common in mediæval times. The Golden Bull of Charles IV, 1356, requires that "three natural days" intervene between the "challenge of defiance" and the beginning of hostilities.⁹

In the fifteenth century the custom of sending heralds to declare war seems to have been common. These were dispatched by the Swedish king to declare war on Denmark so late as 1657.¹⁰ The practice of issuing an ultimatum before

⁸ Cicero, *De Officiis*, I, II; Livy, I, 32.

⁹ Henderson, *Historical Documents of the Middle Ages*, p. 247.

¹⁰ 2 Twiss, p. 61.

engaging in war received sanction of such writers as Bynkershoek. The ambition for overseas territory, the development of maritime warfare, the issue of letters of marque and reprisal, and the general change in the character of international relations led to the weakening of the claim for a prior declaration in order to make acts of war legal. It was formally declared in the decision of Lord Stowell in the case of *The Boedes Lust*, 1803, that this ship, embargoed before the declaration of war, was by virtue of a subsequent war liable to condemnation: "If the matter in dispute had terminated in reconciliation, the seizure would have been converted into a mere civil embargo. That would have been the retroactive effect of that course of circumstances. On the contrary, if the transactions end in hostility, the retroactive effect is directly the other way. It impresses the direct hostile character upon the original seizure."¹¹

Declaration of war came during the eighteenth and nineteenth centuries to be regarded merely as a convenient method for determining when the war status should be held to exist, and most of the wars of recent years have begun without declaration.¹²

By a proclamation of April 22, 1898, the President of the United States declared the north coast of Cuba blockaded. It was not till April 26, 1898, that a declaration of war was issued, which proclaimed that war with Spain had existed since April 21, 1898.¹³

The first act of hostilities between Russia and Japan in 1904 was upon February 6th, but it was not till February 10th that the declarations of war were published. Neither the Russian

¹¹ 5 C. Rob. 245; Scott, 460.

¹² J. F. Maurice, *Hostilities without Declaration of War*.

"The practice of a formal proclamation before recognizing an existing war and capturing enemy's property has fallen into disuse in modern times, and actual hostilities may determine the date of the commencement of war, though no proclamation may have been issued, no declaration made, and no action of the legislative branch of the government had." *The Buena Ventura* (D. C.) 87 Fed. 927; *Id.*, 175 U. S. 334, 20 Sup. Ct. 148, 44 L. Ed. 206.

¹³ *Foreign Relations U. S.*, 1898, p. 772.

nor the Japanese declaration fixes the date at which the war began.¹⁴

By far the greater number of the wars in recent years have been carried on and concluded without declaration. A considerable number have been declared to exist after hostilities had already begun. A very few had been declared in advance of hostilities. Apparently there were about 10 prior declarations in nearly 150 wars since 1700.

The uncertainties in regard to the practice of declaration of war led the Second Hague Conference in 1907 to declare "that it is important that the existence of a state of war should be notified without delay to neutral powers." To this end the conference agreed upon a Convention Relative to the Opening of Hostilities, in which it is declared that:

"Article I. The contracting powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war."

DATE OF COMMENCEMENT OF WAR.

100. (a) War in the material sense commences on the date of the first act of public hostilities.

(b) War in the legal sense commences from the date named in the declaration, and in absence of declaration from the first act of public hostilities.

In modern times the date of the commencement of war has become a matter of great importance. The existence of war imposes obligations upon neutral states. If these obligations are not regarded, a state may become liable to pay indemnity. The belligerent may also exercise certain rights over neutrals, as by visit and search of vessels. Certain articles of trade, which in time of peace may be carried freely, become liable to capture after the outbreak of hostilities. The relationship between citizens of the belligerent states is changed. Indeed, the legal effects of the change from peace to war are so far-reaching that it is essential that the date of such change be definitely determined or easily determinable.

¹⁴ Takahashi, Russo-Japanese War, p. 6.

(a) In case of the existence of war in the material sense, it is essential that persons affected by the existence of hostilities, whether of the belligerent or of other states, should know at what date the relations of peace are superseded by those of war. In absence of any official utterance to the contrary, the first act of public hostilities may be regarded as the commencement of the war.

For states that have no part in the war, the war commences from the period of their own formal recognition of the existence of belligerency, or from the time of such public act by the state party to the hostilities as is in the nature of the recognition of the existence of war, as by the proclamation of blockade by a state.¹⁵

(b) Between the contracting states, which include practically all the leading states of the world, the Hague Convention of 1907 Relative to the Opening of Hostilities endeavored to make definite the date of the opening of hostilities. This convention recognizes that hostilities should not commence between these states without previous declaration. It is not specified that there shall be any particular time between the declaration and commencement of hostilities. Article II provides that: "The existence of a state of war must be notified to the neutral powers without delay, and shall not take effect in regard to them until after the receipt of a notification, which may, however, be given by telegraph. Neutral powers, nevertheless, cannot rely on the absence of notification, if it is clearly established that they were in fact aware of the existence of a state of war."

This convention does not, however, make any provision in regard to the commencement of a war with a party not a signatory of the convention, nor for the commencement of a civil war, and in such cases the first act of public hostilities must be taken as the date of the commencement of the war.

¹⁵ President Lincoln's proclamation of blockade April 19, 1861, was regarded as the date of the beginning of the American Civil War. *The Protector*, 12 Wall. 700, 20 L. Ed. 463; *The Prize Cases*, 2 Black, 635, 17 L. Ed. 459; *The Pedro*, 175 U. S. 354, 20 Sup. Ct. 138, 44 L. Ed. 195.

CHAPTER XI.

AREA AND GENERAL EFFECT OF BELLIGERENT OPERATIONS.

101. Area.

102. General Effect.

AREA OF BELLIGERENT OPERATIONS.¹

101. The area upon which hostilities may be legitimately conducted includes the land and water outside of neutral jurisdiction and the corresponding aerial domain.

Neutral jurisdiction is inviolable, and by the Hague Conventions of 1907 the belligerent is bound to respect this jurisdiction.² The belligerent is prohibited from performing any proximate acts of war in neutral jurisdiction; e. g., equipping vessels, establishing prize courts, etc. With the introduction of aerial navigation and communication, the area of possible belligerent operations has been extended to the atmosphere, and the regulation of the discharge of projectiles from balloons and of the use of wireless telegraph has already begun.³

GENERAL EFFECT.

102. The general effects of war are:

- (1) To break off diplomatic and other nonhostile relations of the belligerent states.**
- (2) To modify treaty relations of the belligerent states.**
- (3) To modify the status of persons within the belligerent states.**

¹ See Cyc., same topic, under "War."

² Appendix, Rights and Duties of Neutral Powers in Case of War on Land, p. 546; Rights and Duties of Neutral Powers in Naval War, p. 563; The Florida, 101 U. S. 37, 25 L. Ed. 898.

³ Discharge of Projectiles and Explosives from Balloons, p. 326; Fauchille, Le Régime Aérien, 8 R. G. D. I. P. 414; Jurisch, Grundsätze des Luftrechts; Int. Law Situations, U. S. Naval War College, 1907, p. 138.

- (4) To modify the status of property within the belligerent states.
- (5) To change the relations of belligerents and allies in accord with the treaties of alliance.
- (6) To change the relations of belligerents and states not parties to the war.
- (7) To modify the relations of persons subject to the jurisdiction of states not parties to the war and the belligerents.

(1) Diplomatic relations are frequently broken off before the commencement of war, and sometimes as an evidence of strained relations liable to result in war.⁴ On April 21, 1898, the Spanish Minister of State sent to Mr. Woodford, the United States Minister at Madrid, the following note:

"In compliance with a painful duty, I have the honor to inform your excellency that, the President having approved a resolution of both Chambers of the United States which, in denying the legitimate sovereignty of Spain and in threatening armed intervention in Cuba, is equivalent to an evident declaration of war, the government of His Majesty has ordered its Minister in Washington to withdraw without loss of time from the North American territory, with all the personnel of the legation. By this act the diplomatic relations which previously existed between the two countries are broken off, all official communication between their respective representatives ceasing, and I hasten to communicate this to your excellency, in order that on your part you may make such dispositions as seem suitable."

To this note Mr. Woodford made immediate reply as follows:

"I have the honor to acknowledge the receipt this morning of your note of this date informing me that the Spanish Minister at Washington has been ordered to withdraw, with all his legation and without loss of time, from North American terri-

⁴ The Spanish minister to the United States asked for his passports, which were given on April 20, 1898. War began according to proclamation on April 21, 1898. Foreign Relations U. S. 1898, p. 766. Japan gave notice of the withdrawal of her diplomatic representative from Russia on February 6, 1904, and the declaration of war was issued on February 10, 1906. Takahashi, Russo-Japanese War. 15.

tory. You also inform me that by this act diplomatic relations between the two countries are broken off; that all official communication between their respective representatives ceases. I have accordingly this day telegraphed the American consul general at Barcelona to instruct all the consular representatives of the United States in Spain to turn their respective consulates over to the British consuls and to leave Spain at once. I have myself turned this legation over to Her Britannic Majesty's embassy at Madrid. That embassy will from this time have the care of all American interests in Spain. I now request passports and safe conduct to the French frontier for myself and the personnel of this legation. I intend leaving this afternoon at 4 o'clock for Paris."

In any case diplomatic relations between belligerents of necessity come to an end on the outbreak of war. The care of the diplomatic hôtel and the general national interests is usually intrusted to some third power friendly to both.

(2) By the outbreak of war treaty relations between belligerents are modified according to their nature.

(a) Treaties of peace and alliance come to an end; e. g., amity commerce, etc.

(b) Certain treaty obligations may be suspended, and revive at close of war; e. g., debts.

(c) Treaties as to hostile relations become operative; e. g., Convention as to Laws and Customs of War on Land.

In accordance with article XXIX of the treaty of 1902 between the United States and Spain; "All treaties, agreements, conventions and contracts between the United States and Spain prior to the Treaty of Paris shall be expressly abrogated and annulled, with the exception of the treaty signed the seventeenth of February, 1834, between the two countries, for the settlement of claims between the United States of America and the government of His Catholic Majesty, which is continued in force by the present convention."

(3) Persons within the belligerent jurisdiction acquire a new status depending upon allegiance, conduct, etc. (Chapter XXIII.)

(4) Property is liable to new burdens and treatment; e. g., certain property must be treated so far as possible as in peace,

while other property may be seized and confiscated. 'The place and relationship of the property may determine its treatment. (Chapter XXIV.)

(5) New obligations and duties may arise between allies in consequence of war; e. g., through a defensive alliance.⁵ The obligations and duties will be determined by the nature of the alliance. A treaty of November 2, 1907, between the states mentioned says: "If the integrity of Norway is threatened or impaired by any power whatsoever, the German, French, British, and Russian governments undertake, on the receipt of a previous communication to this effect from the Norwegian government, to afford to that government their support, by such means as may be deemed the most appropriate, with a view to safeguarding the integrity of Norway."

(6) The belligerents are put under certain restraints as to their conduct within the jurisdiction of states not parties to the war; e. g., limitation of sojourn of war ships in neutral waters, etc. The neutral states are also under certain new obligations; e. g., as to prohibiting equipment of vessels, etc.

(7) The neutral state may be responsible for certain acts of persons within its jurisdiction. There are other acts not involving the neutral state which would be legitimate in time of peace which in time of war are liable to penalty; e. g., trade in goods of the nature of contraband.

⁵ "If by reason of unprovoked attack or aggressive action, wherever arising, on the part of any other power or powers, either contracting party should be involved in war in defense of its territorial rights or special interests mentioned in the preamble of this agreement, the other contracting party will at once come to the assistance of its ally and will conduct the war in common and make peace in mutual agreement with it." Article 2, Agreement Great Britain and Japan, Aug. 12, 1905, 1 A. J. I. Doc. Sup. 15.

CHAPTER XII.

RIGHTS AND OBLIGATIONS DURING WAR.

- 103. Obligations of Belligerents.
- 104. Neutral Duty of Abstention.
- 105. Neutral Duty of Prevention.
- 106. Neutral Obligation of Toleration.
- 107. Neutral Duty of Regulation.
- 108. Civil Rights and Remedies During War.

OBLIGATIONS OF BELLIGERENTS.

103. "Belligerents are bound to respect the sovereign rights of neutral powers, and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any power, constitute a violation of neutrality."¹

Such acts include:

- (a) Hostilities in neutral waters.
- (b) Establishing prize courts in neutral jurisdiction.
- (c) Use of neutral waters as military base.

Since the middle of the nineteenth century the tendency has been to throw more of the burden of war upon the belligerents. This was recognized at the Second Hague Conference in 1907, as seen in the following provisions of the Convention Concerning the Rights and Duties of Neutral Powers in Naval War:

"Article I. Belligerents are bound to respect the sovereign rights of neutral powers, and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any power, constitute a violation of neutrality.

"Article II. Any act of hostility, including capture and the exercise of the right of search, committed by belligerent war ships in the territorial waters of a neutral power, constitutes a violation of neutrality and is strictly forbidden.

"Article III. When a ship has been captured in the territorial waters of a neutral power, this power must employ, if

¹ Hague Convention, 1907, Rights and Duties of Neutral Powers in Naval War, art. 1. Appendix, p. 563.

the prize is still within its jurisdiction, the means at its disposal to release the prize, with its officers and crew, and to intern the prize crew.

"If the prize is not in the jurisdiction of the neutral power, the captor government, on the demand of that power, must liberate the prize, with its officers and crew.

"Article IV. A prize court cannot be set up by a belligerent on neutral territory or on a vessel in neutral waters.

"Article V. Belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries, and in particular to erect wireless telegraphy stations or any apparatus for the purpose of communicating with the belligerent forces on land or sea."

The Hague Convention of 1907 Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land provides that:

"Article I. The territory of neutral powers is inviolable.

"Article II. Belligerents are forbidden to move troops or convoys of either munitions of war or supplies across the territory of a neutral power.

"Article III. Belligerents are likewise forbidden to:

"(a) Erect on the territory of a neutral power a wireless telegraphy station or other apparatus for the purpose of communicating with belligerent forces on land or sea;

"(b) Use any installation of this kind established by them before the war on the territory of a neutral power for purely military purposes, and which has not been opened for the service of public messages.

"Article IV. Corps of combatants cannot be formed nor recruiting agencies opened on the territory of a neutral power to assist the belligerents."

Formerly some of these acts were sometimes allowed. Later the burden of prevention of such acts was thrown upon the neutral. The present tendency is to throw the obligation of refraining from such acts upon the belligerent.

NEUTRAL DUTY OF ABSTENTION.

104. In general, the neutral state is under obligation to refrain from all acts which would involve direct or indirect participation in the hostilities.

Such acts include:

- (a) Furnishing military assistance.**
- (b) State loans.**

While the belligerent is under obligation to respect the neutrality of states taking no part in the war, such states are under obligation to refrain from all acts which would involve participation. A state cannot be at peace, and at the same time be engaged in the war, or undertake acts in furtherance of the hostilities.

(a) Formerly it was common, under treaty stipulations or other agreements, for a neutral to furnish troops or other military assistance to a belligerent. This practice has been disapproved by late writers, and has been abandoned in practice and prohibited by the Hague Convention of 1907.²

Similarly neutral states have at the outbreak of war sold arms or war material from the public supply. Sale of ordnance stores was made by the United States in 1870 to persons who were said to be agents of the French government. A committee of the United States Senate held these sales to be lawful, saying: "If they had been such agents, and if that fact had been known to our government, or if, instead of sending agents, Louis Napoleon or Frederick William had personally appeared at the War Department to purchase arms, it would have been lawful for us to sell to either of them, in pursuance of a national policy adopted by us prior to the commencement of hostilities."³ Such a position is now generally opposed, and the Hague Convention of 1907 declares that: "The supply, in any manner, directly, or indirectly, by a neutral power to a belligerent power, of war ships, ammunition, or war material of any kind whatever, is forbidden."⁴ This

² Hague Convention, 1907, Rights and Duties of Neutral Powers and Persons in Case of War on Land, art. v, Appendix, p. 546.

³ 7 Moore, 973.

⁴ Rights and Duties of Neutral Powers in Naval War, art. VI, Appendix, p. 564.

does not imply any obligation of the neutral to interfere with the ordinary traffic of its nationals in war supplies.

(b) The former practice of making or guaranteeing loans by neutral states in aid of belligerents is now generally regarded as contrary to the principles of neutrality. The making of loans by private citizens is not prohibited.⁵ In 1904 the United States decided it undesirable to become remotely connected with an attempt to raise subscriptions through men enlisted in the navy.⁶

By the Hague Convention of 1907 Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (article 18) it was declared that "supplies furnished or loans made to one of the belligerents, provided that the person who furnishes the supplies or who makes the loans lives neither in the territory of the other party nor in the territory occupied by him, and that the supplies do not come from

⁵ Appendix, art. XVIII, p. 548.

⁶ "Mr. Hay to Mr. Takahira:

"Department of State, Washington, May 5, 1904.

"My Dear Mr. Minister: In a communication dated the 14th ultimo the Secretary of the Navy inclosed a letter from the commandant of the Mare Island Navy Yard, transmitting copies of circulars received in an envelope from the consulate general of Japan at New York City, addressed 'to the Japanese Serving in the United States Navy,' soliciting subscriptions to Japanese bonds, contributions to the relief fund for Japanese soldiers and sailors, and in aid of the Red Cross Society of Japan. In view of the President's proclamation of neutrality, the Secretary of the Navy asked whether the circulars should be forwarded.

"While Japanese in the United States doubtless have a right to subscribe to Japanese bonds, or to contribute to relief and Red Cross Society funds of Japan, yet it is undesirable that such contributions should be sought through the naval official channels of this government.

"Pursuant to these views, the commandant of the Mare Island Navy Yard has been instructed not to forward to the Japanese serving in the United States any circulars of the character above described.

"I now bring the matter to your attention, with the request that you will inform the consular officers of Japan in the United States of the attitude of this government in the matter.

"I am, etc.,

John Hay."

Foreign Relations U. S. 1904, p. 427.

these territories," should not be considered acts which would deprive the neutral person of the right to be treated as a neutral.

NEUTRAL DUTY OF PREVENTION.

- 105. The neutral state is under obligation to use "the means at its disposal" to prevent certain acts, both on the part of its own nationals and on the part of the belligerents.**

The degree of care which a neutral should use to prevent acts which would be in violation of neutrality cannot always be determined. The interpretation of the term "due diligence" has given rise to much difference of opinion.⁷ The interpretation adopted in the award of the Geneva Convention of 1871 was that: "The due diligence referred to in the first and third of the said rules ought to be exercised by neutral governments in exact proportion to the risks to which either of the belligerents may be exposed from a failure to fulfil the obligations of neutrality on their part."

A neutral state is under obligation not to allow its territory to be violated and not to allow it to be used for belligerent purposes, as by the establishing of a wireless telegraph station or the use of one established by the belligerent before the war for military purposes.⁸

"A neutral government is bound to employ the means at its disposal to prevent the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to cruise, or engage in hostile operations, against a power with which that government is at peace. It is also bound to display the same vigilance to prevent the departure from its jurisdiction of any vessel intended to cruise, or engage in hostile operations, which had been adapted entirely or partly within the said jurisdiction for use in war."⁹ In general, a neutral state is bound to exercise due care, "such surveillance as the means at its disposal allow," to prevent the violation of

⁷ 7 Moore, pp. 1053-1076. See, also, 1 Moore, Int. Arbitrations, 572 et seq.; 4 Id., 4057 et seq.

⁸ Hague Convention, 1907, Rights and Duties of Neutral Powers and Persons in Case of War on Land, arts. I-III, Appendix, p. 546.

⁹ Id., Rights and Duties of Neutral Powers in Naval War, art. VIII, Appendix, p. 564.

its neutrality, and the use of such means of prevention cannot be considered an unfriendly act.¹⁰

There have been many claims made as to what acts a neutral was bound to prevent. Before the nineteenth century, the neutral state had not many rights, and it had not many duties. Belligerents made captures in neutral waters during the wars at the end of the eighteenth century. In 1814, during the war between the United States and Great Britain, the American privateer General Armstrong was after resistance captured by the British in the Portuguese harbor of Fayal. The United States made claims against Portugal. At length, in 1852, Louis Napoleon, as arbitrator, decided that, although the attack by the British constituted violation of neutrality, the American vessel should not have resisted, but should have demanded Portuguese protection.¹¹

The attacks by one belligerent upon the vessels of the other in Korean and Chinese harbors during the Russo-Japanese war have given rise to much discussion. Korea, like Manchuria, is generally regarded as having been through exceptional circumstances within the area of hostilities, though neither, strictly speaking, was under the sovereignty of the belligerent at the time of the war. The capture of the Russian destroyer *Ryeshitelni* by Japanese destroyers in the Chinese harbor of Chifu is not on the same basis. Japan had agreed to respect the neutrality of China. The accounts of the case vary; but the general opinion seems to be that the action of the Japanese was in excess of proper belligerent rights, and that it constituted a violation of neutrality.¹²

¹⁰ Id. arts. XV-XVI, Appendix, p. 565.

¹¹ 2 Moore, *Int. Arbitrations*, 1071.

¹² The Japanese government issued a note justifying this action, which said: "The Japanese government has no intention of disregarding the neutrality of China so long as it is respected by Russia; but they cannot consent that Russian warships, as the result of broken engagement and violated neutrality, shall, unchallenged, find in the harbors of China a safe refuge from capture or destruction." Takahashi says that: "He firmly believes that the peculiar disposition of Chefoo amply justified the conduct of the Japanese, where the naval operations made it entirely impossible to deal with the *Ryeshitelni* in the same way as with the *Mandjur* at Shanghai, and that a belligerent is entitled by virtue of *jus angaria* to resort to a decisive

In 1862 the *Alabama*, which had been fitted out in England, left Liverpool, ready to receive warlike equipment, but not equipped. The *Alabama* received her equipment and crew for the most part outside of British jurisdiction. The case of the *Florida*, *Georgia*, and *Shenandoah* were similar. The spoliation upon commerce led the United States to claim that, in permitting these vessels to fit out in and depart from British jurisdiction, Great Britain had been remiss in the performance of neutral duties. The claims were at length under the Treaty of Washington submitted to an arbitration tribunal, which met at Geneva, December 15, 1871. The tribunal awarded to the United States \$15,500,000. It was held that Great Britain had not displayed "due diligence" in preventing the fitting out of these vessels, and that "due diligence" would be in "exact proportion to the risks to which either of the belligerents may be exposed from failure to fulfill the obligations of neutrality on their part." This interpretation has been regarded as putting a heavy burden upon neutrals, and it seems that "due diligence" should be determined from conditions as appearing to the neutral, rather than from risks to the belligerents, of which a neutral can scarcely be cognizant.¹³

measure with such an impotent neutral state as China." *Int. Law Applied to the Russo-Japanese War*, p. 444.

"The occurrence reflects no credit upon a power which up to that time had been careful to keep its conduct correct according to the standards of international law." Lawrence, *War and Neutrality in the Far East* (2d Ed.) p. 293.

"So far as the *Ryeshitelni* incident is a question between the belligerents, it is difficult, on any construction of the case of the General *Armstrong*, to defend the action of Japan, which was clearly the aggressor." Smith & Sibley, *Int. Law during Russo-Japanese War*, p. 122.

"The Japanese government refused to offer any apology, disavowal, or restitution for this gross violation of Chinese neutrality, and it must be admitted that her conduct in this matter, although altogether exceptional, constitutes a blot upon a record which was otherwise remarkably clean and spotless from the standpoint of international law." Hershey, *Int. Law and Diplomacy of the Russo-Japanese War*, p. 263.

¹³ Cushing, *Treaty of Washington*; Bernard, *Neutrality of Great Britain during the American Civil War*; 1 Moore, *Int. Arbitrations*, 315.

There is a point where it may be difficult to distinguish between a legitimate business transaction on the part of individuals and an undertaking which it is the duty of the neutral to prevent. The Hague Convention of 1907 holds the neutral under obligation to use "the means at its disposal" to prevent violations of its neutrality by its own nationals or by belligerents, which seems a reasonable basis for estimating neutral liability and is comparable with the standards of liability under municipal law.

A neutral state is not bound to prevent the export of or commerce in arms or war material in the ordinary course of trade.

A neutral is, however, under obligations to prevent within neutral jurisdiction the recruiting or enlistment of men for belligerent service, though it is not responsible in case where persons go separately to enlist in the belligerent service.

Formerly the passage of troops through belligerent territory was generally allowed. Later it was allowed under treaty stipulations. In 1815 the allied armies passed through the territory of Switzerland; but Switzerland was practically under duress, and the same government refused a similar permission in 1870 to certain Alsatians. In the Franco-German war of 1870, the German government endeavored to induce the Belgian government to permit the passage through Belgian territory of wounded Prussians and French. This was referred to the French government, who replied that it would consider such act as a violation of neutrality. The permission was refused, and the Belgian government disarmed, and detained as prisoners, all soldiers of either army that were driven into their territory. By the Hague Convention of 1907, the "belligerents are forbidden to dispatch troops or convoys of either munitions of war or supplies across the territory of a neutral power," and the neutrals are called upon to prevent such action.¹⁴

In general, a neutral is under obligation "to employ the means at its disposal" to prevent (a) the commission of hostilities within its jurisdiction; (b) the using of its territory as

¹⁴ Hague Convention, 1907, Rights and Duties of Neutral Powers and Persons in case of War on Land, arts. II-V, Appendix, p. 546.

a base; (c) the fitting out of hostile expeditions within its jurisdiction; and (d) the equipping of vessels for such expeditions.

NEUTRAL OBLIGATION OF TOLERATION.

106. The neutral state is under obligation to tolerate in time of war interference which would not be allowed in time of peace.

Because of the mere existence of war, which is itself regarded as legitimate, a neutral state is under obligation to tolerate certain acts by the states engaged in war which in time of peace would not be allowed. The belligerent claims the right to put his opponent beyond the power of resistance, and in the prosecution of this end claims the right to prevent any action by neutrals which would hinder the attainment of his object, either by making it possible for his opponent to resist longer or more effectively. Such acts of interference as the neutral tolerates are commonly classed under the following heads:

Visit and Search of Neutral Private Vessels.

(a) The form of interference which is most common is that of visit and search of neutral private vessels on the high seas or within belligerent jurisdiction. In time of peace a private vessel upon the high seas would be under the jurisdiction of the state whose flag it is entitled to carry. In time of war the belligerents may investigate, in order to learn what the relation of the vessel may be to the war.

Contraband.

(b) Certain goods, which in time of peace are articles which a merchant vessel may carry freely, may from their usefulness in war be liable to seizure.

Blockade.

(c) Ports open to commerce in time of peace may for military ends be closed in time of war.

Unneutral Service.

(d) Acts which are allowed in time of peace may become liable to penalty if performed in time of war.

Exercise of Military Authority.

(e) The exercise of military authority over neutral persons and property may be in the belligerent's own territory, or in the time of military occupation in the territory of his opponent, or it may be upon the high seas.

NEUTRAL DUTY OF REGULATION.

107. A neutral state may during war regulate the conduct of persons subject to its jurisdiction and the conduct of belligerents within its jurisdiction.

Neutrality laws usually prescribe in detail the course of conduct which a neutral state proposes to require from those within its jurisdiction during war. These laws are municipal in character, but become obligatory in an international sense when made part of a public neutrality proclamation. Such laws are quite full, in the United States usually called the "Neutrality Act,"¹⁵ and in Great Britain usually called the "Foreign Enlistment Act."¹⁶ Such laws usually prohibit certain acts under penalty, to be inflicted by domestic authority, and withdraw protection in case force is used by the belligerent to prevent certain actions.¹⁷

¹⁵ Rev. St. §§ 5281-5291 (U. S. Comp. St. 1901, pp. 3599-3602).

¹⁶ St. 33 & 34 Vict. c. 90.

¹⁷ "Every person, who, within the territory or jurisdiction of the United States, begins or sets on foot, or provides, or prepares the means for, any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, shall be deemed guilty of a high misdemeanor and shall be fined not exceeding three thousand dollars and imprisoned not more than three years." Rev. St. § 5286 (U. S. Comp. St. 1901, p. 3601).

The British Foreign Enlistment Act of 1870 was passed in pursuance of the report of a royal commission appointed for that purpose.

Section 1 defines and punishes by fine and imprisonment illegal enlistment.

Section 2 refers to military or naval expeditions.

Section 3 prohibits the augmentation without license of the warlike force of any ship, etc.

Section 5: "Any person, who, within Her Majesty's dominions, and without the license of Her Majesty, (1) builds, agrees to build or

Neutrality proclamations generally contain the regulations which the neutral state proposes to enforce during war. Sometimes these regard both the relations of those subject to the jurisdiction of the neutral state and belligerents, who would ordinarily be granted exemption from its jurisdiction. These proclamations usually prescribe the conditions under which vessels may enter, sojourn, coal, etc., within neutral jurisdiction, and regulate such other matters as the state may deem expedient.

The Hague Conventions of 1907 regard it as "desirable that the powers should issue detailed enactments to regulate the results of the attitude of neutrality when adopted by them," and consider that it is "for neutral powers an admitted duty to apply these rules impartially to the several belligerents."

Regulations as to Internment of Belligerent Troops.

In general the troops of a belligerent may not enter the land area of a neutral.¹⁸

"Art. XI. A neutral power, which receives on its territory troops belonging to the belligerent armies, shall intern them, as far as possible, at a distance from the theater of war.

"It may keep them in camps, and even confine them in fortresses or in places set apart for this purpose.

causes to be built, (2) issues or delivers a commission to, (3) equips, or (4) dispatches, or causes or allows to be dispatched, any ship with intent or knowledge or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign state at war with any state with which Her Majesty is at peace, is declared thereby to offend against the law of Great Britain." (An exception is made in the case of a person who builds or equips a vessel in pursuance of a contract made before the outbreak of war provided he complies with certain conditions prescribed in the act.)

Section 23 empowers the Secretary of State to seize and search and detain a suspected ship until condemned or released by process of law.

Section 24 makes it the duty of the local authority to detain a suspected ship, and communicate at once the fact of such detention to the proper authority.

For provisions of other states, vide Pitt-Cobbett, *Cas. Int. Law* (2d Ed.) pp. 288-291.

¹⁸ Hague Convention, 1907, *Rights and Duties of Neutral Powers and Persons in Case of War on Land*, Art. II, Appendix, p. 546.

"It shall decide whether officers can be left at liberty on giving their parole not to leave the neutral territory without permission."

"Art. XIII. A neutral power which receives escaped prisoners of war shall leave them at liberty. If it allows them to remain in its territory, it may assign them a place of residence.

"The same rule applies to prisoners of war brought by troops taking refuge in the territory of a neutral power."¹⁹

Sick and wounded, brought into a neutral state, must not again take part in the war. A neutral state may, however, allow the passage of hospital trains through its territory.²⁰

Regulations as to Sojourn of Belligerent Vessels in Neutral Ports.

"In absence of special provisions to the contrary in the legislation of a neutral power, belligerent war ships are not permitted to remain in the ports, roadsteads, or territorial waters of the said power for more than twenty-four hours, except in the cases covered by the present convention."²¹ The twenty-four hour rule had received increasing sanction, particularly since the middle of the nineteenth century, so that it may be said to have been generally accepted, even before the Hague Conference of 1907. This conference defined its application. The neutral must notify belligerent war vessels in its ports at the outbreak of war to depart within the specified time, which is twenty-four hours, unless otherwise proclaimed by the neutral. This stay may be prolonged on account of stress of weather or need of repairs to make the vessel seaworthy. The neutral may determine what repairs are necessary for this purpose. Twenty-four hours are usually allowed between the departure of ships belonging to one belligerent and ships belonging to the other. While some neutral states had from time to time, even in the eighteenth century, prescribed the number of belligerent war ships which might enter their ports, a general regulation of the number was made at the Hague

¹⁹ Id. arts. XI, XIII, Appendix, p. 547.

²⁰ Id. art. XIV, Appendix, p. 547.

²¹ Hague Convention, 1907. Rights and Duties of Neutral Powers in Naval War, art. XII, Appendix, p. 564.

Conference of 1907, and in the absence of provisions to the contrary no belligerent may have more than three war ships in a neutral port or roadstead at the same time.

Supplying Food and Fuel.

While belligerent ships of war may not use a neutral water as a base "for replenishing or increasing their supplies of war material or their armament, or for completing their crews," they are permitted to take on supplies of food to bring these up to the peace standard. The amount of fuel which may be supplied in a neutral port and the frequency of the supply has been much discussed since the introduction of artificial means of propelling war ships. There was no agreement upon this subject at the time of the Geneva Arbitration, and neutrality proclamations since that time sometimes make no mention of the matter and sometimes strictly limit the supply. The French practice has generally been very liberal, while the British has tended toward greater stringency. In 1904 Great Britain interpreted her regulations as prohibiting the use of British ports for coaling for the purpose of proceeding to the seat of war, or to any position on the line of route for the purpose of intercepting neutral ships on suspicion of carrying contraband, and allowed coal only for the nearest home port, or some "nearer named neutral destination." The Hague Convention of 1907 states:

"Article XIX. Belligerent war ships may only revictual in neutral ports or roadsteads to bring up their supplies to the peace standard.

"Similarly these vessels may only ship sufficient fuel to enable them to reach the nearest port in their own country. They may, on the other hand, fill up their bunkers, built to carry fuel, when in neutral countries which have adopted this method of determining the amount of fuel to be supplied.

"If, in accordance with the law of the neutral power, the ships are not supplied with coal within twenty-four hours of their arrival, the permissible duration of their stay is extended by twenty-four hours.

"Article XX. Belligerent war ships which have shipped fuel in a port belonging to a neutral power may not within

the succeeding three months replenish their supply in a port of the same power.”²²

Entrance of Prize into Neutral Ports.

The practice in regard to the entrance of war vessels with prize was formerly generally allowed, but neutrality proclamations of recent years have more and more generally prohibited or restricted this action. The entrance of prize under a prize master has been similarly prohibited. Formerly the prize might be left in a neutral port pending adjudication by a prize court. In some instances the courts were even established within neutral jurisdiction. The tendency has been away from such practice, until it was again proposed in the Hague Conference of 1907 in the following form:

“Article XXIII. A neutral power may allow prizes to enter its ports and roadsteads, whether or not under convoy, when they are brought there to be sequestered pending the decision of a prize court. It may have the prize taken to another of its ports.

“If the prize is convoyed by a war ship, the prize crew may go on board the convoying ship.

“If the prize is not under convoy, the prize crew are left at liberty.”

The United States, while adhering to the remainder of this Convention, subject to interpretation of Article III, reserved and excluded Article XXIII.²³ The preceding articles of this convention show the generally accepted rules:

“Article XXI. A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions.

“It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral power must order it to leave at once; should it fail to obey, the neutral power must employ the means at its disposal to release it, with its officers and crew, and to intern the prize crew.

“Article XXII. A neutral power must, similarly, release a prize brought into one of its ports under circumstances other than those referred to in article XXI.”

²² Id. Appendix, p. 566.

²³ Id. Appendix, p. 567.

Internment of Vessels.

Speaking of asylum to naval forces, Hall, representing the view of the latter half of the nineteenth century, says: "Marine warfare so far differs from hostilities on land that the forces of a belligerent may enter neutral territory without being under stress from their enemy. Partly as a consequence of the habit of freely admitting foreign public ships of war belonging to friendly powers to the ports of a state as a matter of courtesy, partly because of the inevitable conditions of navigation, it is not the custom to apply the same rigor of precaution to naval as to military forces. A vessel of war may enter and stay in a neutral harbor without special reasons; she is not disarmed on taking refuge after defeat; she may obtain such repair as will enable her to continue her voyage in safety; she may take in such provisions as she needs, and, if a steamer, she may fill up with enough coal to enable her to reach the nearest port of her own country; nor is there anything to prevent her from enjoying the security of neutral waters for so long as may seem good to her. To disable a vessel, or to render her permanently immovable, is to assist her enemy; to put her in a condition to undertake offensive operations is to aid her country in its war. The principle is obvious; its application is susceptible of much variation; and in the treatment of ships, as in all other matters in which the neutral holds his delicate scale between two belligerents, a tendency toward the enforcement of a harsher rule becomes more defined with each successive war."²⁴ With the opening of the twentieth century the tendency toward internment of belligerent vessels seeking refuge from an enemy in a neutral port became evident. The Russian vessel *Mandjur* entered the port of Shanghai in February, 1904, and after considerable international correspondence was interned. Essential parts of the machinery were removed and the vessel was disarmed. The crew was also practically interned. Similar treatment was accorded the Russian vessels *Askold* and *Grosvoi* in the same port in August, to the *Tsarevitch* in Kiachow by the German authorities, to the *Diana* by the French at Saigon in September, to the *Lena* by the United States at San Francisco in

²⁴ Int. Law (5th Ed.) p. 626.

September, and in June, 1905, to the fleet of Admiral En-guist at Manila. The same principle was recognized by China. Thus Russia and Japan acknowledge the principle which Great Britain, France, the United States, and China put in practice. The Hague Convention of 1907 incorporated this principle into a regulation as follows:

"Article XXIV. If, notwithstanding the notification of the neutral power, a belligerent ship of war does not leave a port where it is not entitled to remain, the neutral power is entitled to take such measures as it considers necessary to render the ship incapable of taking the sea during the war, and the commanding officer of the ship must facilitate the execution of such measures.

"When a belligerent ship is detained by a neutral power, the officers and crew are likewise detained.

"The officers and crew thus detained may be left in the ship or kept either on another vessel or on land, and may be subjected to the measures of restriction which it may appear necessary to impose upon them. A sufficient number of men for looking after the vessel must, however, be always left on board.

"The officers may be left at liberty on giving their word not to quit the neutral territory without permission."²⁵

Other Regulations.

A neutral may make such further regulations of an impartial nature as may be deemed expedient. While a neutral power is not called upon to regulate the use of public or private telegraph, yet it may regulate such use in an impartial manner.²⁶ The Hague Convention of 1907 provides that: "The contracting powers shall communicate to each other in

²⁵ Rights and Duties of Neutral Powers in Naval War, Appendix, p. 566.

²⁶ "Article VIII. A neutral power is not called upon to forbid or restrict the use on behalf of the belligerents of telegraph or telephone cables or of wireless telegraphy apparatus belonging to it or to companies or private individuals.

"Article IX. Every measure of restriction or prohibition taken by a neutral power in regard to the matters referred to in articles VII and VIII must be impartially applied by it to both belligerents.

"A neutral power must see to the same obligation being observed

due course all laws, proclamations, and other enactments regulating in their respective countries the status of belligerent war ships in their ports and waters, by means of a communication addressed to the government of the Netherlands, and forwarded immediately by that government to the other contracting powers.”²⁷

CIVIL RIGHTS AND REMEDIES DURING WAR.

108. **As between the hostile parties, war in general suspends civil rights and remedies.**

Contracts.

War, in general, suspends existing contracts and terminates the capacity to make new contracts.²⁸ Naturally, also, it makes the performance of certain contracts physically impossible.

Agency.

Agency is similarly conditioned by war.

Insurance.

In case of insurance, while the policies may be extinguished by war, the insured is generally entitled at the close of the war to equitable value of the policy.²⁹

by companies or private individuals owning telegraph or telephone cables or wireless telegraphy apparatus.”

Hague Convention, 1907, Rights and Duties of Neutral Powers and Persons in Case of War on Land, Appendix, p. 547.

²⁷ Rights and Duties of Neutral Powers in War on Land, art. XXVII.

²⁸ *Scholefield v. Eichelberger*, 7 Pet. 586, 8 L. Ed. 793.

²⁹ Mr. Justice Bradley said, in the case of *N. Y. Life Ins. Co. v. Statham*, 93 U. S. 24, 23 L. Ed. 789:

“We are of the opinion, therefore, first, that, as the companies elected to insist upon the condition in these cases, the policies in question must be regarded as extinguished by the nonpayment of the premiums, though caused by the existence of the war, and that an action will not lie for the amount insured thereon.

“Secondly, that, such failure being caused by a public war, without the fault of the assured, they are entitled *ex æquo et bono* to recover the equitable value of the policies, with interest from the close of the war.”

Fire insurance. *Semmes v. Hartford Ins. Co.*, 13 Wall. 158, 20 L. Ed. 490. See *Wambaugh*, Cases on Insurance, 651, note.

Interest on Obligations.

Interest on obligations is usually suspended during war, if the parties are themselves in the jurisdiction of the hostile belligerents, and the creditor is not represented by an agent within the jurisdiction of the debtor.³⁰

Partnership.

Partnerships, where one partner is within the jurisdiction of one belligerent and the other within the jurisdiction of the other belligerent, are in general dissolved.³¹

Intercourse and Trade.

Rights of intercourse and trade are in general suspended, and when trade or intercourse is carried on it is liable to the risks of war, without remedy, and sometimes is specially penalized.

Non-Intercourse Acts.

Penalties for entering upon trade or other commercial relations with an enemy are sometimes prescribed in non-intercourse acts. Such an act in regard to dealing in Russian securities was passed during the Crimean War by Great Britain,³² and general acts were passed by the United States Congress in 1861.³³

³⁰ Ward v. Smith, 7 Wall. 447, 19 L. Ed. 207.

³¹ "In a foreign or international war, from the time it is declared or recognized, all the people in the territory and subject to the dominion of each belligerent, without regard to their feelings, dispositions, or natural relations, become in legal contemplation, and so continue to the close of hostilities, the enemies of all the people resident in the territory of the other belligerent; and all negotiation, trading, intercourse, or communication between them, unless licensed by the government, is unlawful. Such a war, as between the citizens or subjects of the respective belligerents, ipso facto dissolves all commercial partnerships and all contracts wholly executory and requiring for their continued existence commercial intercourse or communication; and while it does not abrogate, yet it suspends, all other existing contracts and obligations and the remedies thereon, and renders all contracts, with rare exceptions, entered into pending hostilities, illegal and void." *Small's Administrator v. Lumpkin's Executrix*, 28 Grat. (Va.) 832.

³² St. 17 & 18 Vict. c. 123.

³³ 12 Stat. 255, 404.

Remedies.

The courts of one belligerent are in general closed to persons domiciled within the jurisdiction of the other belligerent.³⁴

³⁴ The Prize Cases, 2 Black, 671, 17 L. Ed. 459.

"It is certainly true that, as to individuals, their right to sue in the courts of a belligerent, or to hold or enforce civil rights, depends, not on their birth and native allegiance, but on the character which they hold at the time when these rights are sought to be enforced. A neutral, or a citizen of the United States, who is domiciled in the enemy's country, not only in respect to his property, but also as to his capacity to sue, is deemed as much an alien enemy as a person actually born under the allegiance and residing within the dominions of the hostile nation. This, indeed, has long been settled as the general law of nations, and enforced in the tribunals of prize, and has been latterly recognized and confirmed in the municipal courts of other nations. And the same principle has been applied to a house of trade established in a hostile country, although the parties might happen to have a neutral domicile; the property of the house being, for such purpose, considered as affected with the hostile character of the country in which it is employed." Mr. Justice Story, in *case of Society for Propagation of the Gospel v. Wheeler*, 2 Gall. 127, Fed. Cas. No. 13,156.

CHAPTER XIII.

PERSONS DURING WAR.

- 109. Persons within Belligerent Jurisdiction.
- 110. Combatants and Noncombatants.
- 111. Neutral Individuals.

PERSONS WITHIN BELLIGERENT JURISDICTION.

- 109. Persons within belligerent jurisdiction are in general regarded as having enemy character, and, if not nationals of the enemy state, as liable to the consequences of association with the enemy.**

The simple fact of being within belligerent jurisdiction makes a person, whatever his allegiance and whatever his conduct, liable to the hardships of war.¹

He may be restrained in his liberty, and is liable to injury consequent upon the legitimate conduct of hostilities; i. e., in the time of siege he might be detained within the lines and become liable to the consequences of such detention, though it is customary to allow noncombatants to withdraw.

A neutral person, domiciled within belligerent jurisdiction, is liable to an equable portion of the war taxes and other burdens. His ships upon the high seas may be treated as enemy merchant ships.

COMBATANTS AND NONCOMBATANTS.

- 110. The status of persons may be determined by their conduct, usually as combatant or noncombatant.**

In early practice a state at war regarded and treated all persons, wherever found, owning allegiance to an enemy state, as properly subject to hostile measures, such as the deprivation of liberty or more severe treatment.

¹ General orders 100, U. S. War Dept. April 24, 1863, No. 21. See Appendix, p. 491.

At the present time the fact of allegiance is to a large extent ignored in the time of hostilities, and the question of war status is mainly determined by conduct.

Combatant status is extended to those who under government sanction engaged either directly or indirectly in the operations of war, and under exceptional cases to those who without government authorization defend themselves from belligerent attack. The following is the provision of the Hague Convention of 1907 Respecting the Laws and Customs of War on Land:

“Chapter I.—*The Qualifications of Belligerents.*

“Article I. The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

“1. To be commanded by a person responsible for his subordinates;

“2. To have a fixed distinctive emblem recognizable at a distance;

“3. To carry arms openly; and

“4. To conduct their operations in accordance with the laws and customs of war.

“In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination ‘army.’

“Article II. The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with article I, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war.

“Article III. The armed forces of the belligerent parties may consist of combatants and noncombatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war.”

Similarly those regularly commissioned for maritime warfare are combatants.

As, under article II above, resistance to attack on land may be allowed, so on the sea the officers and crew of a merchant vessel who by force defend themselves from attack are re-

garded as combatants, and if captured may be treated as prisoners of war.

The status of combatants is not extended to those who without state authorization engage in offensive hostilities, as in case a merchant vessel of one belligerent attacks another merchant vessel, or when private persons engage in offensive hostilities on land. The treatment of such persons may be according to the nature of the act. If the act is piratical, the usual penalty has been hanging. In time of war the strained feeling due to hostilities is usually taken into consideration.

Spies were formerly liable to summary treatment, but at present their status is well defined.

“Chapter II.—*Spies*.

“Article XXIX. A person can only be considered a spy when, acting clandestinely or on false pretenses, he obtains or endeavors to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.

“Thus, soldiers not wearing a disguise, who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies. Similarly, the following are not considered spies: Soldiers and civilians, carrying out their mission openly, intrusted with the delivery of dispatches intended either for their own army or for the enemy’s army. To this class belong likewise persons sent in balloons for the purpose of carrying dispatches and, generally, of maintaining communications between the different parts of an army or a territory.

“Article XXX. A spy taken in the act shall not be punished without previous trial.

“Article XXXI. A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage.”²

Noncombatant status is in general extended to those who take no direct part in the war. Such status is usually conced-

² Hague Convention, 1907, Laws and Customs of War on Land, Appendix, p. 542.

ed to women, children, clergy, scientists, discoverers, professional men, ordinary laborers, etc., who do not participate in the hostilities, regardless of allegiance.³

The United States, so early as July 6, 1798, authorized the President, in event of war, to regulate the sojourn of subjects of a hostile state remaining within United States jurisdiction after the outbreak of war.⁴ Treaties have also provided for such contingencies.⁵

³ "When persons are allowed to remain, either for a specified time after the commencement of war, or during good behavior, they are exonerated from the disabilities of enemies for such time as they in fact stay, and they are placed in the same position as other foreigners, except that they cannot carry on a direct trade in their own or other enemy vessels with the enemy country." Hall, *Int. Law* (5th Ed.) 395. See, also, 1 Kent, *Comm.* p. 56; 1 Halleck, *Int. Law* (4th Ed.) 430, 461, 465; 2 *Id.* 484, 506.

⁴ 1 Stat. 577.

⁵ "If by any fatality which cannot be expected, and which may God avert, the two contracting parties should be engaged in a war with each other, they have agreed, and do agree, now for then, that there shall be allowed the term of six months to the merchants residing on the coasts and in the ports of each other, and the term of one year to those who dwell in the interior, to arrange their business and transport their effects wherever they please, with the safe conduct necessary to protect them and their property, until they arrive at the ports designated for their embarkation. And all women and children, scholars of every faculty, cultivators of the earth, artisans, mechanics, manufacturers and fishermen, unarmed and inhabiting the unfortified towns, villages or places, and, in general, all others whose occupations are for the common subsistence and benefit of mankind, shall be allowed to continue their respective employments, and shall not be molested in their persons, nor shall their houses or goods be burnt, or otherwise destroyed, nor their fields wasted by the armed force of the belligerent, in whose power, by the events of war, they may happen to fall; but if it be necessary that anything should be taken from them for the use of such belligerent, the same shall be paid for at a reasonable price.

"And it is declared that neither the pretense that war dissolves treaties, nor any other whatever, shall be considered as annulling or suspending this article; but, on the contrary, that the state of war is precisely that for which it is provided, and during which its provisions are to be sacredly observed, as the most acknowledged obligations in the law of nations."

Article 21, Treaty between United States and Italy, Feb. 26, 1871.

NEUTRAL INDIVIDUALS DURING WAR.

111. A neutral state is not, in general, responsible for the conduct of its nationals during war; but the individual may be liable under domestic law to the state to which he owes jurisdiction and under international law to the belligerent.

Neutral persons are those who are nationals of states not taking part in the war. They are liable for acts which they commit against a belligerent, especially if they engage in military operations. Liability does not extend, in general, to aid by loans or indirect aid in civil or administrative services.⁶

While the neutral power is not obliged to prevent its nationals from engaging in contraband trade, from attempting to violate a blockade, or from unneutral service, yet it has no claim against a belligerent which inflicts the ordinary penalties for such offenses on its nationals.

A neutral state may, however, protest against any exceptionally severe treatment of its nationals, or against any policy which might involve such penalties. There was a general protest against the declaration of the Russian authority in the Far East in 1904 to the effect that correspondents using wireless telegraphy for communicating war news to the enemy would be treated as spies,⁷ and this protest was heeded.

⁶ Hague Convention, 1907, Rights and Duties of Neutral Powers and Persons in Case of War on Land, c. III, Neutral Persons, Appendix, p. 548.

⁷ Foreign Relations U. S. 1904, p. 729.

CHAPTER XIV.

PROPERTY ON LAND.

- 112. Public Property During War—Immovable Public Property.
- 113. Movable Public Property.
- 114. Property of Municipalities and Institutions.
- 115. Immovable Private Property.
- 116. Movable Property of Military Use.
- 117. Private Property in Enemy Jurisdiction.
- 118. Booty.

PUBLIC PROPERTY DURING WAR—IMMOVABLE PUBLIC PROPERTY.

- 112. (a) Immovable public property, destined for use in war, is liable to such treatment as the enemy may determine.
- (b) Immovable public property, which is not destined for use in war, but which may be productive of national income and is within the jurisdiction or under the military authority of an enemy state, may be administered by that state according to the principles of usufruct.
- (c) Immovable public property similarly situated, which is not of use for war, but devoted to educational, religious, and like purposes, is exempt.

(a) Immovable public property, destined for military uses, as forts, dry docks, or arsenals, may become of special danger to the enemy, and therefore may be treated in such manner as the enemy may deem best suited to render it innocuous, or it may be used by the enemy against its original owner. A fortification might be destroyed, or might be occupied and used by the enemy for his own ends.

(b) Real estate, public buildings, forests, etc., belonging to one belligerent state, while within the power of the other belligerent, may be administered for his benefit. Formerly such property was regarded as hostile, and liable to destruction or other severe treatment. The title to such property is not now regarded as transferred with the physical control. The title must be confirmed by conquest or other method, and meantime

the occupying state has merely the right of occupancy and use of products of the property.¹ The occupying state may collect and use the rents of public real property falling due, and a receipt for rent paid under such conditions is valid. An invader may use public buildings for public purposes. These buildings are liable to the ordinary wear and tear of such use. Furniture is considered a part of the building, and may not be removed. Likewise, if crops belonging to the state or trees in the public forests come to maturity or the time for cutting, they may be used by the invading state. If such property is sold to a party, that party would not have rights if he had not taken the property within his possession during the period of occupancy, as the original government, after its restoration, might prevent its appropriation.

(c) Immovable property, not of use for war, as educational institutions, churches, etc., though belonging to the state, is exempt, and should be restored at the end of the war in its original condition.

The rents or profits of property permanently set aside for the maintenance of hospitals, educational institutions, or for scientific or artistic purposes, are not liable to seizure, even though the property from which they are derived may be within the power of the enemy.

SAME—MOVABLE PUBLIC PROPERTY.

113. (a) Movable public property of one belligerent, which may be of use for war, is liable to seizure by the other belligerent.

(b) Movable public property, which is not of use for war, is exempt.

(a) Custom has, in general, applied the principle that all public property, which is susceptible of use by the belligerent seizing it for warlike purposes, or which can be of similar use to his enemy, directly or indirectly, can be appropriated. There is no question in regard to the following classes of property: Munitions of war, vessels of war, means of trans-

¹ 2 Halleck, Int. Law (4th Ed.) 73; Hague Convention, 1907, Laws and Customs of War on Land, art. 55, Appendix, p. 544.

port, state treasure, consisting of moneys and checks payable to bearer, taxes, customs, etc. In general, taxes must be applied to administrative expenses, or to the payment of debts for which specifically hypothecated; the overplus only being applied by the belligerent to his own use. In regard to certain other movable or personal property, such as checks requiring indorsement, and contract debts in other forms, which may require payment to be enforced judicially, or the seizure of which may not operate to relieve the debtor making payment of his obligation, there is some question as to the right of seizure.² Article 53 of the Hague Convention Respecting the Laws and Customs of War on Land provides that "an army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the state." Professor Westlake says of this important and possibly doubtful clause that it "is so worded as to exempt from seizure both, first, cash, funds, and realizable securities of which the state is only custodian, such as savings bank funds, and, secondly, debts due to the state not falling under the description of realizable securities. The first exemption speaks for itself. In the second exemption the original French is '*valeurs exigibles*,' which Professor Holland translates 'realizable securities,' and which has been translated officially into German as '*eintreibbare forderungen*.' Professor Holland describes it as purposely ambiguous, and there are grave differences of opinion as to what the rule on the matter ought to be. There is no doubt that, if the occupation should be ripened into conquest, all the debts due to the extinguished state will belong by the laws of state succession to the conqueror and may be sued for by him. There is also no doubt that documents payable to bearer may be seized by an occupant as part of the state treasure, so that he thereby becomes, not only their actual, but their lawful, bearer, and can sue on them as soon as due, whether or not his occupation of the place where they were seized has continued in the meantime or not. But the occupant who is not a conqueror does not represent the person of the enemy state, and therefore, as it seems to us, can supply nothing which remains to be done by the enemy

² Hall, *Int. Law* (5th Ed.) 420.

state in order to complete the right to judgment on a debt. If he has seized a document payable to order, he cannot indorse it; if the debt is claimed by any other kind of title, he may have seized the evidence necessary for proving it, but he cannot put himself forward as plaintiff, or use his physical power in the locality to enforce payment. This, however, is not the modern German view. By an ordinance of November 26, 1870, the Germans required persons who owed payments for timber from the state forests, in what they had established as 'the general government of Alsace,' to make those payments to their cashiers in the district."³

(b) Public archives, contents of museums, scientific apparatus, vessels engaged in exploration or scientific research, etc., are exempt.⁴

PROPERTY OF MUNICIPALITIES AND INSTITUTIONS.

114. "The property of the communes, that of institutions dedicated to religion, charity, and education, the arts and sciences, even when state property, shall be treated as private property.

All seizure of, destruction, or willful damage done to institutions of this character, historic monuments, and works of art and science, is forbidden, and should be made the subject of legal proceedings."⁵

IMMOVABLE PRIVATE PROPERTY.

115. Immovable private property is in general exempt, though subject to the necessities of war.

In early practice immovable private property of one belligerent within the power of the other belligerent was appropriated, later it was administered for the benefit of the belligerent having power over it, and in modern times the real property of private citizens has been exempt from appropriation, unless because of a necessity of war. Private property, as buildings,

³ Westlake, *Int. Law*, pt. 2, p. 103.

⁴ See, also, under military occupation, post, p. 334.

⁵ Hague Convention, 1907, *Laws and Customs of War on Land*, art. 56, Appendix, p. 544.

would be liable to the consequences of actual belligerent operations; i. e., if a building should be in the line of fire, it might be destroyed. Private property, as a building, may be appropriated for the use of forces in case of necessity, and in which case indemnity would be paid for its use.

MOVABLE PROPERTY OF MILITARY USE.

116. Movable or personal property is under regulations subject to seizure.

- (a) **CONTRIBUTIONS**—Contributions consist in moneys levied by the authority of commander in chief in excess of the taxes.
- (b) **REQUISITIONS**—Requisitions consist in the enforced delivery in kind of articles needed by the enemy for consumption or temporary use.
- (c) **FORAGING**—When from lack of time or other reason requisitions are not available, supplies in kind may be taken directly by the forces from the fields or other places by foraging.

(a) Plunder and pillage are now abolished, and the regulated seizure of private property may be said to have taken the place of these ancient seizures and subsequent confiscations.

“No contribution shall be collected, except under a written order, and on the responsibility of a commander in chief.

“The collection of the said contribution shall only be effected as far as possible in accordance with the rules of assessment and incidence of the taxes in force.

“For every contribution a receipt shall be given to the contributors.”⁶

(b) Requisitions consist in food, clothes, forage, wagons, horses, lodging, labor, railroad material, boats, and other means of transport, all of which are levied under what is recognized as military necessity. These may be made by the commander of any detached portion of the army under a higher authority, which latter regulates the articles to be requisitioned.

“Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the

⁶ Id. art. 51, Appendix, p. 544.

army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country.

"Such requisitions and services shall only be demanded on authority of the commander in the locality occupied.

The requisitions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given, and the payment of the amount due shall be made as soon as possible."⁷

Requisitions may be made by naval forces for provisions or supplies of which they are in immediate need. After due notice such requisitions may be enforced by bombardment, subject to the restrictions of the Hague Convention of 1907. "These requisitions shall be in proportion to the resources of the place. They shall only be demanded in the name of the commander of the said naval force, and they shall, as far as possible, be paid for in cash; if not, they shall be evidenced by receipts."⁸

(c) Sometimes it is not possible to find the owner of property; e. g., grain in the field, wood in the forest, etc., or other supplies in order to make requisition. When seizure of such property is made for the immediate use of the military forces, it is of the nature of foraging, and is resorted to in lieu of making requisitions.

PRIVATE PROPERTY IN ENEMY JURISDICTION.

- 117. The personal or movable property of citizens of either belligerent state found in the territorial jurisdiction of the other, also debts due to citizens of the enemy state, are no longer regarded confiscable, unless under special authorization.**

In regard to debts due by a state to citizens of an enemy state, the rule is now well established that they are not confiscable, nor is the interest due upon such debt sequestered. This rule is now so well established and acknowledged by all the authorities that, in order to avoid such payments, the

⁷ Id. art. 52, Appendix, p. 544.

⁸ Bombardment by Naval Forces, post, p. 323.

agreement must incorporate, as an express reservation, the right to sequester; since, in the absence of such reservation, a state is assumed to have contemplated payment, notwithstanding the existence of war.⁹

The United States Supreme Court in 1814 held, in reversing the decision of the lower court, that the effect of a declaration of war, or of the existence of war, alone did not confer upon the courts the power to confiscate enemy property without some expression of the will of the state itself to that effect, although it was admitted that the existence of war carried with it the right to effect such confiscation.¹⁰ Many treaties also definitely provide for the exemption of private property of one belligerent in the territory of the other.¹¹

BOOTY.

118. Booty is the term usually applied to property captured on land, and title thereto vests in the state.

In some countries the property captured as booty is sold, and the proceeds used in whole or in part as a compensation to the captors. Great Britain, in certain cases, rewards such services. The United States appropriates all property captured by its armies on land.

⁹ *Ware v. Hylton*, 3 Dall. 199, 1 L. Ed. 568.

¹⁰ *Brown v. United States*, 8 Cranch, 110, 3 L. Ed. 504.

¹¹ Treaty between United States and Italy, Feb. 26, 1871, art. 21.

CHAPTER XV.

PROPERTY ON THE WATER.

- 119. Public Property of Belligerents on the Water—Vessels.
- 120. Goods.
- 121. Private Property of Belligerents on the Water—Vessels.
- 122. Vessels Exempt by Service.
- 123. Vessels Exempt by Occupation.
- 124. Vessels Exempt, by *Delai de Faveur*.
- 125. Goods in General.
- 126. Means of Telegraphic Communication.

PUBLIC PROPERTY OF BELLIGERENTS ON THE WATER—VESSELS.

119. Public vessels of a belligerent outside of neutral jurisdiction are liable to capture, unless specially exempt.

The following vessels, when innocently employed, are exempt:

- (1) Cartel ships commissioned for the exchange of prisoners.**
- (2) Vessels charged with religious, scientific, and philanthropic missions.**
- (3) Duly authorized hospital ships.**

War on land is in the main aimed at the submission of the enemy army. War on the sea aims, not merely at the defeat of the enemy navy, but also at the destruction of the enemy's commerce and means of communication and the weakening or destruction of the enemy's means of defense and support. Much greater freedom is allowed in the treatment of enemy property on the water than on land. Where in land warfare attack is mainly on armed enemy individuals, on the sea attack is mainly upon vessels.

The public vessels of the enemy are special objects of attack in warfare on the sea. All such vessels as are not specifically engaged in nonmilitary occupations, which serve both belligerents alike or serve the world at large, are liable to capture. The number of such vessels would be comparatively small and includes:

(1) Cartel ships serving both belligerents alike.

(2) Vessels engaged in work for the good of humanity in general.

(3) Hospital ships.¹

The Japanese, in the war with China, in 1893, and in the war with Russia, in 1904, also exempted "lighthouse vessels and tenders."

SAME-GOODS.

120. Public goods of a belligerent are liable to capture outside of neutral jurisdiction.

Goods belonging to an enemy state would in general be liable to capture on the sea, if not under a neutral flag. Probably exemptions analogous to those in case of land warfare would hold in case of works of art, archives, historical and scientific collections, and the like.

PRIVATE PROPERTY OF BELLIGERENTS ON THE WATER—VESSELS.

121. Private vessels of the belligerent outside of neutral jurisdiction are liable to capture unless specially exempt.

There have been attempts to bring about the general exemption from capture of all innocently employed private vessels. In 1783 Franklin sent an article to Oswald, which he rather wished than expected would be adopted in the treaty with Great Britain, to the effect that "all merchants or traders, with their unarmed vessels employed in commerce, exchanging the products of different places, and thereby rendering the necessities, conveniences, and comforts of human life more easy to obtain and more general, shall be allowed to pass freely, unmolested."² The treaty between the United States and Prussia of 1785 contained the following: "All merchant and trading vessels employed in exchanging the products of differ-

¹ Hague Convention, 1907, Naval War and Geneva Convention, art. 1, Appendix, p. 549.

² 9 Sparks. Works of Franklin, p. 469.

ent places, and thereby rendering the necessities, conveniences, and comforts of human life more easy to be obtained and more general, shall be allowed to pass free and unmolested; and neither of the contracting powers shall grant or issue any commission to any private armed vessels, empowering them to take or destroy such trading vessels or interrupt such commerce." The treaty between Italy and the United States of February 26, 1871, now in force, provides in article 12: "The high contracting parties agree that in the unfortunate event of a war between them the private property of their respective citizens and subjects, with the exception of contraband of war, shall be exempt from capture or seizure on the high seas or elsewhere by the armed vessels or by the military forces of either party; it being understood that this exemption shall not extend to vessels and their cargoes which may attempt to enter a port blockaded by the naval forces of either party."

The question received much attention at the time of the Declaration of Paris in 1856 and again at the Hague Conferences of 1899 and 1907; but exemption of private vessels from capture is not yet secured.

SAME—VESSELS EXEMPT BY SERVICE.

122. Certain private vessels of belligerents are exempt from capture because of the nature of their service:

(a) **Cartel ships.**

(b) **Hospital ships.**

(c) **Ships engaged in religious, scientific, or philanthropic work.**

(a) Cartel vessels belonging to private citizens of the belligerents engaged in the exchange of prisoners are exempt from capture while employed according to the cartel agreement, by which they serve both belligerents alike.

(b) Hospital ships serve those in need of their assistance without distinction as to nationality, and hence it is of mutual advantage that they be exempt from capture.³

³ Hague Convention, 1907, Naval War and Geneva Convention, arts. 2-4, Appendix, p. 549.

(c) The vessels charged with religious, scientific, or philanthropic missions serve humanity in general, and are therefore exempt.⁴

SAME—VESSELS EXEMPT BY OCCUPATION.

123. Certain private vessels of belligerents are exempt from capture because of the nature of their occupations:

- (a) **Coast fishing vessels innocently employed.**
- (b) **Small vessels employed in local trade.**

(a) After an extended review of the authorities, Mr. Justice Gray, delivering the opinion of the United States Supreme Court in 1900, said: "This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent states, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed, and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war.

"The exemption, of course, does not apply to coast fishermen or their vessels, if employed for a warlike purpose, or in such a way as to give aid or information to the enemy; nor when military or naval operations create a necessity to which all private interests must give way."⁵

This exemption does not apply to deep-sea fishing vessels.⁶

(b) Small boats, employed in local trade, with their appli-

⁴ Hague Convention, 1907, Right of Capture in Naval War, art. 4. Scott, *Peace Conferences*, p. 283.

⁵ *The Paquete Habana*, 175 U. S. 677, 20 Sup. Ct. 290, 44 L. Ed. 320; Hague Convention, 1907, Right of Capture in Naval War, art. 3, Scott, *Peace Conferences*, p. 283.

⁶ *The Paquete Habana*, 175 U. S. 677, 20 Sup. Ct. 290, 44 L. Ed. 320.

ances, rigging, tackle, and cargo, are exempt from capture so long as they are innocently employed.⁷

The exemption of coast fishing vessels and small boats engaged in local trade, secured by the Hague Convention of 1907, was, according to the report of the American delegation, "to give to the better practice the sanction of conventional obligation and to include small nonsea-going vessels, exclusively engaged in the coast trade, within its beneficial operation."

SAME—VESSELS EXEMPT BY DELAI DE FAVEUR.

- 124. Private vessels of one belligerent, not intended for conversion into war ships, within or bound for the ports of the other belligerent at the outbreak of war, are usually allowed a certain number of days (days of grace, *delai de faveur*) before becoming liable to capture, and in case such vessels are unable to leave port at the expiration of the period they may be interned, and are restored at the end of the war.**

The idea of allowing a degree of favor to enemy private vessels in port at the outbreak of war is not new. Molloy, in the seventeenth century, wrote: "If the ships of any nation happen to arrive in any of the king of England's ports, and afterwards, and before their departure, a war breaks out, they may be secured, privileged without harm of body or goods; but under this limitation, till it be known to the king how the prince or republick of those whose subjects the parties are have used and treated those of our nation in their ports. But if any should be so bold as to visit our ports after a war is begun, they are to be dealt with as enemies."⁸

Later practice has not been uniform.⁹ Proclamations of

⁷ Hague Convention, 1907, Right of Capture in Naval War, art. 3, Scott, Peace Conferences, p. 283.

⁸ *De Jure Maritimo*, bk. I, c. 1, XVII.

⁹ French Declaration, March 27, 1854, six weeks; British Declaration, March 29, 1854, six weeks; Spanish Decree, April 23, 1898, five days; United States Proclamation, April 25, 1898, thirty days; Japanese Ordinance, Feb. 9, 1904, seven days; Russian Rules, Feb. 14, 1904 (except in Far East), forty-eight hours.

belligerents have allowed varying periods, though it is generally recognized that some period should be allowed to innocent private vessels,¹⁰ but not to private vessels adapted for conversion into war vessels or under subsidy for war purposes.¹¹

The treatment of enemy merchant ships at the outbreak of hostilities was considered at the Hague Conference in 1907 and a convention was signed.¹² This convention states that it is desirable that a reasonable number of days of grace should be allowed for merchant vessels in an enemy port or bound for an enemy port at the outbreak of hostilities. The number of days is not determined. Such vessels kept in an enemy port by force majeure may be interned without compensation or appropriated on payment of compensation. Vessels which have left port before the outbreak of war and are encountered on the high seas while still ignorant of the commencement of war are entitled to similar treatment.¹³

They may be detained till the end of the war without compensation or appropriated subject to payment of compensation. The crew, passengers, and ship's papers must be placed in safety.

These exemptions do not apply in case the vessel has touched at a port after the outbreak of hostilities.

GOODS IN GENERAL.

125. In general, when on the sea and unless under a neutral flag, the private goods of one belligerent are liable to capture by the other belligerent.

The modifications in the severity of treatment of property on land have not extended to property at sea,¹⁴ but the attitude toward property at sea in time of war has depended

¹⁰ *The Buena Ventura*, 175 U. S. 384, 20 Sup. Ct. 148, 44 L. Ed. 206.

¹¹ *The Panama*, 176 U. S. 535, 20 Sup. Ct. 480, 44 L. Ed. 577.

¹² Convention Relative to the Status of Enemy Merchant Ships at the Outbreak of Hostilities.

¹³ *Id.* arts. 1-3.

¹⁴ Bentwich, *War and Private Property*, pp. 79-96.

rather upon policy than upon law. The United States has consistently favored the exemption of merchant vessels and their cargoes from capture. Franklin, in 1783, said of the principle of exemption from capture of private property at sea in time of war: "I rather wish than expect it will be adopted."¹⁵ President Monroe, in his message of December 2, 1823, and President Pierce, in his message of December 4, 1854, advocate agreements for the abolition of the right to capture private property at sea, and in 1856 President Pierce proposed as a condition under which the United States would ratify the Declaration of Paris, by which "privateering is and remains abolished," the addition of the clause: "The private property of subjects and citizens of a belligerent on the high seas shall be exempt from seizure by public armed vessels of the other belligerent except it be contraband." The Congress of the United States resolved on April 28, 1904: "That it is the sense of the Congress of the United States that it is desirable, in the interest of uniformity of action by the maritime states of the world in time of war that the President endeavor to bring about an understanding among the principal maritime powers with a view of incorporating into the permanent law of civilized nations the principle of the exemption of all private property at sea, not contraband of war, from capture or destruction by belligerents." The American delegation at the Hague Conference of 1907 endeavored to secure the exemption of innocent private property at sea during war.

Professor Westlake, after referring to the fact that the United States and some other states have advocated the policy of exemption of enemy property at sea, says: "On principle we must say that the capture at sea of enemy property as such is a military measure, an operation of war, and that its defense is therefore independent of the mediæval doctrine of the solidarity of sovereigns and states with their subjects, on which the civil courts maintain the doctrines of nonintercourse and even perhaps of confiscation. Its justification must lie in its effect on the fortunes of a war. To appreciate that effect, it is not sufficient to consider the damage done to the pecuniary resources of a belligerent power by seizing and ap-

¹⁵ Franklin labored for this in 1781. 9 Works (Sparks' Ed.) p. 469.

propriating the property of those from whom it can levy taxes and cutting off their opportunities of trade. It must also be remembered that the capture of enemy ships has always carried with it the right to detain their crews as prisoners. Indeed the doctrine of '*courir sus aux ennemis*' was from the first as much directed against persons as against things. Hence the existing practice deprives the enemy of important resources, both of ships which might be available as transports or for purposes of supply, and of men who might render service on board ships so employed or in the fighting navy, and, indeed, would in general be legally compellable to do so."¹⁶

In Atlay's edition of Wheaton's International Law, in 1904, the position against the exemption from capture of private property at sea is stated as follows: "The indiscriminate seizure of private property on land would cause the most terrible hardship, without conferring any corresponding advantage on the invader. It cannot be effected without in some measure relaxing military discipline, and is sure to be accompanied by violence and outrage. On the other hand, the capture of merchant vessels is usually a bloodless act; most merchant vessels being incapable of resisting a ship of war. Again, property on land consists of endless varieties, much of it being absolutely useless for any hostile purpose, while property at sea is almost always purely merchandise, and thus is part of the enemy's strength. It is, moreover, embarked voluntarily, and with a knowledge of the risk incurred, and its loss can be covered by insurance. An invader on land can levy contributions or a war indemnity from a vanquished country. He can occupy part of its territory and appropriate its rates and taxes; and by these and other methods he can enfeeble the enemy and terminate the war. But in a maritime war a belligerent has none of these resources, and his main instrument of coercion is crippling the enemy's commerce. If war at sea were to be restricted to the naval forces, a country possessing a powerful fleet would have very little advantage over a country with a small fleet or with none at all. If the enemy kept his ships of war in port, a powerful fleet, being unable to operate against commerce, would have little or no occupation.

¹⁶ Westlake, Int. Law, pt. II, War, p. 130.

The United States proposed to add to the Declaration of Paris a clause exempting all private property on the high seas from seizure by public armed vessels of the other belligerent, except it be contraband; but this proposal was not acceded to. Nor does it seem likely, for the reasons stated above, that maritime nations will forego their rights in this respect.

"On the other hand, the enormous extension of railways, the increase of the practice of marine insurance, and the dependence of the greatest naval power in the world upon an ocean-borne food supply, have deprived many of the older arguments in favor of the retention of the claim to capture private property at sea of their force, while at the same time it has inclined many persons in Great Britain, more especially those interested in shipping, to look favorably on a proposed abandonment of the claim."¹⁷

Property subject to capture at sea occupies an entirely different position from that of property on land. In enforcing requisitions of private property on land, it is usual to limit the property taken to such as will be useful to the captor for the purposes of war. In taking this property the noncombatant population is deprived of material necessary for the support of themselves or their animals. On the other hand, the reasons urged in support of the right to take property at sea are that only the material interests suffer, and no personal suffering is inflicted. Again, such property is shipped by the owners with the intention and idea of deriving a profit from the enterprise. The risks of war are appreciated and understood, and can be provided for by means of insurance. It is in the custody of men trained and paid for the purpose; and the sea, upon which it is sent, is *res omnium*, the common field of war as well as of commerce. The objections, therefore, that exist to the capture of private property on land, do not apply with like force to property at sea, yet the effect of captures at sea in deranging the trade of the enemy is very much greater than that consequent upon the enforcing of requisitions, and often leads to urgent demands on the part of influential merchants for an early termination of the war.

The effect of the old general rule of capture of all enemy

¹⁷ Wheaton, *Int. Law* (Atlay's Ed.) § 355b.

property was modified by the Declaration of Paris, to the extent that "the neutral flag covers enemy's goods, with the exception of contraband of war."¹⁸

There are divergent opinions upon what determines the enemy character of goods. The English courts have decided that the liability to capture extends, not merely to the goods of those who owe allegiance to the belligerent state, but also to those who have commercial domicile in the belligerent state,¹⁹ while the property of those who are domiciled in a neutral state is exempt.²⁰

The European continental opinion is divided. Certain states regard the domicile of the owner as the test of the liability of the property to capture, as in the English precedents; while other states follow the French doctrine, that the nationality of the owner, and not the domicile, determines the liability of the property to capture.²¹ Japan has followed a modified form of the rule of domicile. The United States has generally followed the law of domicile as determining enemy character. Long discussions at the London Naval Conference in 1908-09 did not result in agreement upon the basis which should decide character of property, beyond the rule that (article 58) "the neutral or enemy character of goods found on board an enemy vessel is determined by the neutral or enemy character of the owner." The report of the conference says: "But it cannot be concealed that article 58 solves no more than a part of the problem, and that the easier part. It is the neutral or enemy character of the owner which determines the character of the goods; but what is to determine the neutral or enemy character of the owner? On this point nothing is said, because it was found impossible to arrive at an agreement."²²

The English courts have decided that the enemy character of goods is determined by the domicile of the owner, though a man's business may have domicile in more than one state, and "if he acts as a merchant of both he must be liable to be con-

¹⁸ Declaration of Paris, 1856, Appendix, p. 487.

¹⁹ *The Harmony*, 2 C. Rob. 322.

²⁰ 4 C. Rob. 255, note.

²¹ 1 Pistoye et Duverdy, *Traite des Prises Maritimes*, p. 321.

²² British Parl. Papers, Misc. No. 4 (1909) p. 61.

sidered as a subject of both, with regard to the transactions originating respectively in those countries.”²³ To the extent to which the property is identified with the enemy, to that extent it would be treated as enemy property. Some other states consider that the nationality of the owner is the sole criterion in determining the character of goods.

Complications due to the changes in methods of business, by the introduction of partnerships and other forms of business organization, are not provided for in early precedents.

The London Naval Conference in 1908-09 considered the propriety of determining the neutral or enemy character of goods belonging to a country “according as the company had its headquarters in a neutral or enemy country.” No decision was reached, however.

Some have maintained that the products of an enemy soil should be considered as enemy property, though the owner may be a neutral. The United States Supreme Court, following the British doctrine, announced that: “The opinion that the ownership of the soil does, in some degree, connect the owner with the property, so far as respects that soil, is an opinion which certainly prevails very extensively. It is not an unreasonable opinion. Personal property may follow the person anywhere; and its character, if found on the ocean, may depend on the domicile of the owner. But land is fixed. Wherever the owner of the country may reside, that land is hostile or friendly according to the condition of the country in which it is placed. It is no extravagant perversion to say that the proprietor, so far as respects his interest in this land, partakes of this character, and that the produce, while the owner remains unchanged, is subject to the same disabilities.”²⁴ France and some of the other European states do not admit this position.

²³ *The Jonge Klassina*, 5 C. Rob. 302.

²⁴ *Bentzon v. Boyle*, 9 Cranch, 191, 3 L. Ed. 701; *Scott*, 598; *Vrouw Anna Catharina*, 5 C. Rob. 167. The Japanese doctrine is similar.

MEANS OF TELEGRAPHIC COMMUNICATION.

126. Means of telegraphic communication wholly within the jurisdiction of either belligerent may be seized, interrupted, or destroyed by the other belligerent.

Means of telegraphic communication between either belligerent and a neutral may, outside of neutral jurisdiction, be seized, interrupted, or destroyed by the other belligerent as a military necessity, subject to liability for damages.

Communication by Wires.

Before the invention of wireless telegraphy, it had become fairly well established that telegraph lines, whether on land or submarine, connecting belligerent points, were, when beyond neutral jurisdiction, liable to such treatment as military expediency might suggest.

Submarine cables, connecting belligerent with neutral points, were liable to such treatment outside of neutral jurisdiction as the necessities of war might require, though at the close of the war damages might be assessed.²⁵ The Hague Convention, 1907, Laws and Customs of War on Land (article 54), provides: "Submarine cables connecting an occupied territory with a neutral territory shall not be seized or destroyed except in the case of absolute necessity. They must likewise be restored, and compensation fixed when peace is made."²⁶

Communication without Wires.

Radio-telegraphy has for many purposes of war supplanted telegraphy by wires. The difference in range and nature of service of wireless telegraphy has brought about agreements among the states as to its use.²⁷ The principles which should regulate the control of radio-telegraph in time of war are not yet fully established.²⁸ Certain regulations were adopted

²⁵ Wilson, Submarine Telegraphic Cables, Lectures U. S. Naval War College, 1901; Scholz, Krieg and Seekabel; Jouhannaud, Les câbles sous-marins.

²⁶ Appendix, p. 544.

²⁷ Berlin Agreement, 1903; International Wireless Telegraph Convention, Berlin, Nov. 3, 1906.

²⁸ Scholz, Drahtlose Telegraphie und Neutralität; Thonier, De la Notion de Contrebande de Guerre, 334; Rolland, La Telegraphie

by the Hague Conference in 1907. By these belligerents are forbidden to—

“(a) Erect on the territory of a neutral power a wireless telegraphy station or other apparatus for the purpose of communicating with belligerent forces on land or sea;

“(b) Use any installation of this kind established by them before the war on the territory of a neutral power for purely military purposes, and which has not been opened for the service of public messages.”²⁹

The neutral is not, however, called upon to restrict the use of apparatus belonging to it, or to companies or private individuals,³⁰ though impartiality must be shown to both belligerents.³¹ In case of war on the sea, belligerents are likewise forbidden “to erect wireless telegraphy stations or any apparatus for the purpose of communicating with the belligerent forces on land or sea.”³²

The Institute of International Law in 1906 adopted regulations which the members regarded as embodying the principles which should prevail in regard to wireless telegraphy. While enunciating the principle that the air is free, the Institute admitted that a state is entitled, both in time of peace and in time of war, to exercise such aërial jurisdiction as is necessary to its well-being. A neutral state may also become responsible to the extent of its ability for the regulation of the use for war purposes of its aërial domain.³³

“From practice, as shown in various states, from the opinions of the courts and of writers, from the votes of conferences and from international agreements, it is evident that the state within whose jurisdiction a wireless telegraph apparatus is or passes is and will be authorized to exercise a degree

sans Fil et le Droit des Gens, 13 R. G. D. I. P. 86; Melli, Die Drahtlose Telegraphie im Internen Recht und Völkerrecht; Int. Law Situations, U. S. Naval War College, 1907, 138.

²⁹ Article III, Rights and Duties of Neutral Powers and Persons in Case of War on Land.

³⁰ Id. art. VIII.

³¹ Id. art. IX.

³² Hague Convention, 1907, Rights and Duties of Neutral Powers in Naval War, art. 5.

³³ For Regulations of Institute, see ante, p. 122.

of control over its use. The responsibility resting upon such state will be large.

"In order to avoid possible complications in time of war, it will be expedient in time of war for states, whether neutral or belligerent, to exercise control over wireless telegraphy as circumstances seem to require."³⁴

It is admitted that a belligerent may prohibit or regulate the use of radio-telegraphy within the area of hostilities, that a neutral state must use reasonable care that its territory be not abused for military purposes, that it can make regulations accordingly, and that confiscation of wireless apparatus, and in some cases of a vessel upon which the apparatus is, may result from the unneutral use of wireless telegraphy.

³⁴ Int. Law Situations, U. S. Naval War College, 1907, p. 175.

CHAPTER XVI.

MARITIME CAPTURE.

- 127. Maritime Capture.
- 128. Title to Prize.
- 129. Treatment of Prize—Conducting to Port.
- 130. Release.
- 131. Appropriation and Destruction.
- 132. Prize Money and Bounty.
- 133. Privateers.
- 134. Volunteer, Auxiliary, or Subsidized Vessels.

MARITIME CAPTURE.

- 127. To constitute capture, there must be some act showing intention to take possession upon the part of the captor and submission on the part of the captured.**

To constitute a capture at sea, there must be evidence of the *animus capiendi* and of submission.¹ The act of taking physical possession is not absolutely necessary, because the surrender of the master and crew or vessel is complete when the flag is lowered, and the conditions may be such as to render actual taking of possession impracticable,² and yet the continuance of hostilities under the circumstances may be uncalled for. The most usual method of showing intention to take possession is to place on board the vessel a prize crew sufficient to prevent an attempt at rescue.

The captor acquired property in the things captured, according to the ancient practice, when things seized by him were brought into his camp, fortress, port, or fleet. Later the arbitrary rule was laid down that possession for twenty-four

¹ *The Mary*, 2 Wheat. 123, 4 L. Ed. 200; *The Alexander*, 8 Cranch, 169, 3 L. Ed. 524; *The Grotius*, 9 Cranch, 368, 3 L. Ed. 762.

² "If by reason of rough weather or other circumstances this is impracticable, the commander should require the vessel to lower her flag, and to steer according to his orders." *British Manual Naval Prize Law*, No. 238. *Edward and Mary*, 3 Rob. 305.

hours was sufficient to transfer title to the property.³ This rule was published in an edict by France in 1581, and became a very general rule of practice for the greater number of civilized nations. Present practice seems to regard effective possession as a satisfactory and equitable evidence of capture.⁴

If a vessel is recaptured before condemnation, it may be restored on payment of salvage;⁵ but, if recaptured after being brought within the effective possession of the captor's forces, it is usually held to belong to the recaptors. When a vessel is recaptured by its original crew, salvage may be awarded to them.⁶

TITLE TO PRIZE.

- 128. The property in a vessel and cargo that is captured, if subsequently condemned, vests in the state as soon as the seizure is effective.**

It is the modern custom to have all prizes sent into port for adjudication before disposition; the object being the protection of neutrals by determining judicially whether the captured vessel and cargo are entirely enemy property. It is also the practice of some states to relinquish their interest in prizes that consist of vessels belonging to private individuals to the captors; but the relinquishment does not become effective until after adjudication by proper tribunals.⁷

TREATMENT OF PRIZE—CONDUCTING TO PORT.

- 129. (a) Captors should care for the persons and property of vessels taken as prize.**

- (b) The prize should in general be sent to the nearest home port where a prize court is sitting.**

(a) The officer in charge of a prize is under obligation to care for the persons on the vessel, in order that they may re-

³ *The Adeline*, 9 Cranch, 244, 3 L. Ed. 719.

⁴ *The Astrea*, 1 Wheat. 125, 4 L. Ed. 52.

⁵ Rev. St. § 4652 (U. S. Comp. St. 1901, p. 3139).

⁶ *The Two Friends*, 1 Rob. 271.

⁷ *United States v. Dewey*, 188 U. S. 254, 23 Sup. Ct. 415, 47 L. Ed. 463.

ceive proper treatment.⁸ They are not, as formerly, regarded as enemies. Special provision is made for their treatment by the Hague Convention of 1907 with Regard to the Exercise of the Right of Capture in Naval War:

"Article V. When an enemy merchant ship is captured by a belligerent, such of its crew as are nationals of a neutral state are not made prisoners of war.

"The same rule applies in the case of the captain and officers likewise nationals of a neutral state, if they promise formally in writing not to serve on an enemy ship while the war lasts.

"Article VI. The captain, officers, and members of the crew, when nationals of the enemy state, are not made prisoners of war, on condition that they make a formal promise in writing not to undertake, while hostilities last, any service connected with the operations of the war.

"Article VII. The names of the persons retaining their liberty under the conditions laid down in article V, paragraph 2, and in article VI, are notified by the belligerent captor to the other belligerent. The latter is forbidden knowingly to employ the said persons.

"Article VIII. The provisions of the three preceding articles do not apply to ships taking part in the hostilities."⁹

Special care is enjoined in all regulations, in order that the property may be brought in intact and without injury.¹⁰

(b) The general rule is, as stated by the United States: "Prizes should be sent in for adjudication, unless otherwise

⁸ British Manual of Naval Prize Law, No. 249. Articles for Government of U. S. Navy, No. 17: "If any person in the navy strips off the clothes of, or pillages, or in any manner maltreats, any person taken on board a prize, he shall suffer such punishment as a court-martial may adjudge."

⁹ Scott, *Peace Conferences*, p. 284.

¹⁰ British Manual Naval Prize Law, No. 247: "When any ship or vessel shall be captured or detained, her hatches are to be securely fastened and sealed, and her lading and furniture, and, in general, everything on board, are to be carefully secured from embezzlement; the officer placed in charge of her shall prevent anything from being taken out of her until she shall have been tried, and sentence shall have been passed on her in a Court of Prize." Articles for Government of U. S. Navy, No. 16.

directed, to the nearest home port in which a prize court may be sitting.”¹¹ In general, a vessel with prize is admitted to a neutral port only in case of unseaworthiness, stress of weather, or want of fuel or provisions, and must leave when the circumstances justifying its entry are at an end. The Hague Convention of 1907 makes provision for the sequestration of prize in a neutral port pending decision of the prize court. The United States, however, adhered to this convention under reservation of this article.¹²

SAME—RELEASE.

130. (a) Sometimes prize is released on payment of ransom, which consists in the repurchase by the original owner from the captor of the property right acquired in the prize.

(b) Sometimes prize is released on bail, or by consent of the authorities of the state making the capture.

(a) Release on payment of ransom is a repurchase of the right which, at the time, the captors have to the property.¹³

¹¹ General Order 492, No. 16. U. S. Navy Department, June 20, 1898; Rev. St. § 4617 (U. S. Comp. St. 1901, p. 3127).

¹² “Article XXI. A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions.

“It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral power must order it to leave at once; should it fail to obey, the neutral power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew.

“Article XXII. A neutral power must, similarly, release a prize brought into one of its ports under circumstances other than those referred to in article XXI.

“Article XXIII. A neutral power may allow prizes to enter its ports and roadsteads, whether under convoy or not, when they are brought there to be sequestrated pending the decision of a prize court. It may have the prize taken to another of its ports.

“If the prize is convoyed by a war ship, the prize crew may go on board the convoying ship.

“If the prize is not under convoy, the prize crew are left at liberty.”

Rights and Duties of Neutral Powers in Naval War, Appendix, p. 566.

¹³ *Maissonaire v. Keating*, 2 Gall. 325, Fed. Cas. No. 8,978; *Miller v. Resolution*, 2 Dall. 15, 1 L. Ed. 263.

The contract is embodied in a "ransom bill," made out in duplicate, one copy of which is retained by the commander of the ransomed vessel, and serves as a safe conduct, protecting the vessel from recapture by the belligerent or his allies, provided he does not voluntarily depart from the terms of the agreement, as to the port for which he is to sail, as to the course to be pursued, or as to the time agreed upon for making the voyage. Protection is not forfeited in case the vessel is driven from her course by stress of weather. The captor retains the other copy of the ransom bill. He may take from the captured vessel a hostage for the payment of the ransom. The ransom bill is discharged if the vessel of the captor, with the hostage and bill on board, be captured by the enemy. If the ransom bill and hostage are transmitted to a place of safety, the ransom is to be paid, even though the captor's vessel be afterward captured. In certain countries the captor is authorized to sue directly upon the bill, if the ransom is not paid. In England payment is compelled by or through an action brought by the imprisoned hostage for his freedom. Some states do not favor the practice, others permit it under restrictions, and others place no formal restrictions upon it, though it is not now common.¹⁴

(b) Sometimes prizes are released on bail after a hearing,¹⁵ or released pending a decree of the court, particularly if goods which are perishable or rapidly deteriorating are involved.¹⁶ Release is prompt in case of illegal capture, as when captures are made within neutral jurisdiction or after conclusion of peace.¹⁷

¹⁴ Power to regulate in King and Council in Great Britain. St. 27 & 28 Vict. c. 25, § 45. The Hoop, 1 Rob. 201; Woolsey, Int. Law, p. 449.

¹⁵ The George, 2 Wheat. 278, 4 L. Ed. 239.

¹⁶ The Alliance, Fed. Cas. No. 244; St. 27 & 28 Vict. c. 25, § 26.

¹⁷ The Santissima Trinidad, 7 Wheat. 283, 5 L. Ed. 454.

SAME—APPROPRIATION AND DESTRUCTION.

131. (a) Military necessity will justify the captor in appropriating or in selling prize after appraisal.
- (b) The destruction of enemy vessels has been allowed in case of military necessity, as unseaworthiness, the presence of infectious disease, the lack of a prize crew, or the imminent danger of recapture.
- (c) As a general rule, neutral vessels which have been captured may not be destroyed before adjudication.
- (d) As an exception, a neutral vessel which would be liable to condemnation may be destroyed when taking her into port for adjudication "would involve danger to the safety of the warship or to the success of the operations in which she is at the time engaged."
- (e) As an exception, the captor may demand the handing over, or proceed himself to the destruction, of any goods liable to condemnation found on board a vessel not herself liable to condemnation, provided the circumstances are such as would involve danger to the safety of the war ship or to the success of the operations in which she is at the time engaged.

(a) The Instructions Issued by the Navy Department of the United States in the Spanish-American War, 1898, stated that: "The title to property seized as prize changes only by the decision rendered by the prize court. But if the vessel itself, or its cargo, is needed for immediate public use, it may be converted to such use; a careful inventory and appraisal being made by impartial persons and certified to the prize court.

"If there are controlling reasons why vessels may not be sent in for adjudication, as unseaworthiness, the existence of infectious disease, or the lack of a prize crew, they may be appraised and sold."¹⁸

Provision for appropriation is also made in the legislation.¹⁹ The United States provides that:

"Whenever any captured vessel, arms, munitions, or other material are taken for the use of the United States before it comes into the custody of the prize court, it shall be surveyed, appraised, and inventoried, by persons as competent and im-

¹⁸ General Orders 492, June 20, 1898, No. 24.

¹⁹ St. 27 & 28 Vict. c. 25, § 38.

partial as can be obtained, and the survey, appraisalment, and inventory shall be sent to the court in which proceedings are to be had." ²⁰

These provisions make no distinction between enemy and neutral vessels.

(b) The regulations of various states have permitted the destruction of enemy private vessels in time of war under certain circumstances, usually in cases of unseaworthiness, lack of prize crew, too great distance from prize court, presence of infectious disease, or immediate danger of attack from the enemy.²¹ Such regulations also usually enjoin that the crew of the destroyed vessel should be put in a place of safety. It may not be easy to carry out this regulation when the destroying vessel is itself in immediate danger of attack. To take the crew of a merchant vessel on board at such a time would scarcely be to put them in a safe position. Opinion seems however, to be in favor of allowing the destruction of enemy vessels under stress of circumstances. The Institute of International Law at its session in 1887 drew up rules in regard to this matter.²²

²⁰ Rev. St. § 4624 (U. S. Comp. St. 1901, p. 3130).

²¹ "303. In either of the following cases:

"(1) If the surveying officers report the vessel not to be in a condition to be sent in to any port for adjudication; or,

"(2) if the commander is unable to spare a prize crew to navigate the vessel to a port of adjudication."

British Manual Naval Prize Law.

²² "Sec. 50. Il sera permis au capteur de brûler ou de couler bas le navire ennemi saisi, après avoir fait passer sur le navire de guerre les personnes qui se trouvaient à bord et déchargé autant que possible la cargaison, et après que le commandant du navire capteur aura pris à sa charge les papiers de bord et les objets importants pour l'enquête judiciaire et pour les réclamations des propriétaires de la cargaison en dommages et intérêts dans les cas suivants.

"(1) Lorsqu'il n'est pas possible de tenir le navire à flot, à cause de son mauvais état, la mer étant houleuse;

"(2) Lorsque le navire marche si mal qu'il ne peut pas suivre le navire de guerre et pourrait facilement être repris par l'ennemi;

"(3) Lorsque l'approche d'une force ennemie supérieure fait craindre la reprise du navire saisi;

"(4) Lorsque le navire de guerre ne peut mettre sur le navire saisi

(c) Recent regulations in regard to destruction of prize have made no distinction between enemy and neutral vessels.²³ Action by Russian commanders in the Russo-Japanese War, 1904, particularly the sinking of the British steamer, Knight Commander, though in accord with Russian regulations, led

un équipage suffisant sans trop diminuer celui qui est nécessaire à sa propre sûreté;

"(5) Lorsque le port où il serait possible de conduire le navire saisi est trop éloigné.

"Sec. 51. Il sera dressé procès-verbal de la destruction du navire saisi et des motifs qui l'ont amenée; se procès-verbal sera transmis à l'autorité supérieure militaire et au tribunal d'instruction le plus proche, lequel examinera et, au besoin, complètera les actes y relatifs et les transmettra au tribunal des prises."

9 Annuaire de l'Institut de Droit International, 228.

²³ "28. If there are controlling reasons why vessels may not be sent in for adjudication, as unseaworthiness, the existence of infectious disease, or the lack of a prize crew, they may be appraised and sold; and if this cannot be done they may be destroyed. The imminent danger of recapture would justify destruction, if there was no doubt that the vessel was good prize. But, in all such cases, all the papers and other testimony should be sent to the prize court, in order that a decree may be duly entered."

General Order 492, U. S. Navy Dept., June 20, 1898.

"Article XCI. In the following cases, and when it is unavoidable, the captain of the man of war may destroy a captured vessel, or dispose of her according to the exigency of the occasion. But before so destroying or disposing of her he shall transship all persons on board and, as far as possible, the cargo also, and shall preserve the ship's papers and all other documents required for judicial examination:

"1. When the captured vessel is in very bad condition and cannot be navigated on account of the heavy sea.

"2. When there is apprehension that the vessel may be recaptured by the enemy.

"3. When the man of war cannot man the prize without so reducing her own complement as to endanger her safety."

Japanese Regulations Governing Captures at Sea, March 7, 1904.

"21. In extraordinary cases, when the preservation of a detained vessel proves impossible in consequence of its bad condition or extremely small value (sic), the danger of its recapture by the enemy, or the considerable distance or blockade of the ports, as well as of danger threatening the detaining vessel or the success of its operations, the naval commander is permitted, on his personal responsibility, to burn or sink the detained vessel after having first taken all the people off it, and as far as possible the cargo on board, and also

to vigorous protests from neutrals.²⁴ On August 5, 1905, Russia issued supplementary instructions restricting the destruction of neutral merchant vessels.²⁵ In case of destruction of a neutral vessel before condemnation, it was uniformly held that the captor was liable, not merely for costs, but also for damages.²⁶ The general tendency among neutrals to close their ports to belligerents with prize makes the problem of disposition of prize after capture much more difficult. Opinion upon destruction was so divided that the Hague Conference of 1907 was not able to reach a conclusion upon the matter.

The subject of destruction of neutral vessels prior to condemnation was made one of the subjects for the International Naval Conference of 1908-09. The ten naval powers represented at this conference were divided in opinion—some favoring great freedom in destruction; others favoring absolute prohibition of destruction before condemnation. All at length favored the enunciation of the general rule prohibiting destruction which appears as article 48 of the Declaration of London, February 26, 1909:

“A captured neutral vessel is not to be destroyed by the captor, but must be taken into such port as is proper, in order to

after having taken measures for preserving the documents and other objects on board, and which might prove essential in elucidating matters when the case is examined according to the method prescribed for prize cases.” Russian Prize Regulations, March 25, 1895.

²⁴ British Parliamentary Papers, Russia, No. 1 (1905); Foreign Relations U. S. 1904, p. 734.

²⁵ “Russian vessels were not to sink neutral merchantmen with contraband on board in the future, except in case of direct necessity, but in case of emergency to send prizes into neutral ports.”

Cases of destruction have received much attention. See Lawrence, *War and Neutrality in the Far East*, p. 250; Smith & Sibley, *Int. Law during Russo-Japanese War*, pp. 186, 465; Hershey, *Int. Law and Diplomacy during Russo-Japanese War*, pp. 136, 142, 156; Takahashi, *Int. Law during Russo-Japanese War*, p. 310.

²⁶ “The general rule, therefore, is that if a ship under neutral colors be not brought to a competent court for adjudication the claimants are, as against the captor, entitled to costs and damages. Indeed, if the captor doubt his power to bring a neutral vessel to adjudication, it is his duty to release her.” *The Leucade*, Spinks, 217. See, also, *The Acteon*, 2 Dod. 48; *The Felicity*, 2 Dod. 381.

determine there the rights as regards the validity of the capture."²⁷

(d) It was, however, found that in practice exceptions were made to the general prohibition of prize destruction. It was admitted that when a neutral vessel, which would certainly be condemned, involved "danger to the ship of war or to the success of the operations in which she was at the time engaged," the neutral vessel might be destroyed. The provision of the Declaration of London was as follows:

"Article 49. As an exception, a neutral vessel which has been captured by a belligerent ship, and which would be liable to condemnation, may be destroyed if the observance of article 48 would involve danger to the safety of the ship of war or to the success of the operations in which she is at the time engaged."

The crew and persons on board and the ship's papers must be placed in safety. The destruction of neutral prizes is more fully discussed under section 185, page 412.

(e) Article 54 of the Declaration of London provides that: "The captor has the right to require the giving up, or to proceed to destroy, goods liable to condemnation found on board a vessel which herself is not liable to condemnation, provided that the circumstances are such as, according to article 49, justify the destruction of a vessel liable to condemnation. The captor enters the goods delivered or destroyed in the log book of the vessel stopped, and must procure from the master duly certified copies of all relevant papers. When the giving up or destruction has been completed, and the formalities fulfilled, the master must be allowed to continue his voyage."

The captor is liable to damages if he has not full justification for his action, as under the provisions for destruction of vessels.²⁸

²⁷ Declaration of London, February 26, 1909, art. 48, Appendix, p. 581. See, also, British Parliamentary Papers, Miscellaneous No. 4 and No. 5 (1909).

²⁸ Id. c. IV, p. 582.

PRIZE MONEY AND BOUNTY.

- 132. (a) The proceeds of prize capture after condemnation are sometimes distributed among the captors.**
- (b) The distribution may be according to statutory regulation, or in absence of such regulation according to precedent or general principles.**
- (c) Bounty is sometimes allowed when vessels are sunk or destroyed before adjudication.**

(a) The policy in regard to distribution of the proceeds of prize capture among those participating in the capture has varied, but since the seventeenth century has been generally allowed and regarded as a stimulus for those engaged in war.²⁹ It is still allowed by most states,³⁰ but was abolished in the United States after the Spanish-American War.³¹ By those who regard the object of naval war as the destruction of the enemy's naval strength, the diversion of attention to capture for the sake of prize money is considered contrary to good military policy.

(b) The distribution of prize money is usually determined by municipal regulation, and as a general principle, in absence of regulations, vessels participate in the proceeds of prize in proportion to their participation in the capture. Those vessels within "signal distance," in condition "to render effective aid if required," are usually entitled to share. The question as to what constitutes "signal distance" has always given rise to difficulties,³² which may be multiplied by the introduction of radio-telegraph. How far different vessels and land forces, and in what proportion different grades of officers and mem-

²⁹ 4 Dods. p. 316, note.

³⁰ Determined in Great Britain according to Royal Proclamation, August 3, 1886.

³¹ "All provisions of law authorizing the distribution among captors of the whole or any portion of the proceeds of vessels, or any property hereafter captured, condemned as prize, or providing for the payment of bounty for the sinking or destruction of vessels of the enemy hereafter occurring in time of war, are hereby repealed." Act March 3, 1899, 30 Stat. 1007 (U. S. Comp. St. 1901, p. 1072).

³² *The Mangrove*, 188 U. S. 720, 23 Sup. Ct. 343, 47 L. Ed. 664.

bers of the crew, are entitled to participate, are questions which have received much consideration.³³

(c) "When captors take a lawful prize, they have alternative duties—to save it, if practicable; to destroy it, if it be impracticable to save it. The first duty insures prize money and other elements of the right existing; the second duty involves the sacrifice of prize money, and the pecuniary reward is in the form of bounty."³⁴

PRIVATEERS.

133. A private armed vessel, owned and officered by private persons, acting under a commission from the state, was called a "privateer."

The practice of commissioning private vessels for service in war seems to have prevailed in the beginning of the fifteenth century.

The term "privateer" seems to have been used in the time of Charles II of England to designate a private vessel employed by the admiralty to prey upon an enemy. Fifty years later, in the early eighteenth century, they were not much regarded, "because the manner of such warring is new and not very honorable; but the diligence of our enemies in this piratical way obliges us to be also diligent for the preservation of our commerce."³⁵

³³ *Dewey v. United States*, 178 U. S. 510, 20 Sup. Ct. 981, 44 L. Ed. 1170; *United States v. Dewey*, 188 U. S. 254, 23 Sup. Ct. 415, 47 L. Ed. 463.

British Royal Proclamation of August 3, 1886, allowed, with many possibilities of modification:

Flag officer or officers, one-thirtieth,

Captains or commanding officers, one-tenth of remainder.

Remainder of ship's company divided into eleven classes, members of the lowest class, as signal boy, to receive one share and the highest class, as staff captain, to receive forty-five shares.

Prize Act U. S. 1864, § 10, provided that admiral should receive one-twentieth.

³⁴ *The Santo Domingo* (D. C.) 119 Fed. 386; *United States v. Taylor*, 188 U. S. 283, 23 Sup. Ct. 412, 47 L. Ed. 477.

³⁵ *Sea Laws*, p. 472.

Sweden in 1675 made a treaty with the United Provinces mutually forbidding privateering. The United States made a similar treaty with Prussia in 1785. Article XXIII: "If war should arise between the two contracting parties, * * * neither of the contracting powers shall grant or issue any commission to any private armed vessels, empowering them to take or destroy such trading vessels or interrupt such commerce." On the renewal of the treaty in 1799 this clause was omitted. Franklin, who negotiated the treaty of 1785, strove earnestly for the abolition of privateering and for the exemption of private property from capture. There were many laws and treaties forbidding resort to privateering, but it did not disappear. In 1856 the Declaration of Paris provided: "Privateering is and remains abolished." The United States was willing to adhere to this Declaration, provided there was added a clause "that the private property of the subjects or citizens of a belligerent on the high seas shall be exempted from seizure by public armed vessels of the other belligerent, unless it be contraband." This clause was not added. The United States, Spain, Mexico, and China were among the important states which did not adhere to the Declaration.³⁶ The United States did, however, declare at the outbreak of the Spanish-American War in 1898 that the government would not resort to privateering.³⁷ Spain declared on the 23d of April, 1898, that she retained her right to issue letters of marque, yet that she would "organize for the present a service of auxiliary cruisers of the navy, composed of ships of the Spanish mercantile navy, which will co-operate with the latter for the purposes of cruising, and which will be subject to the

³⁶ Spain definitely adhered to the Declaration of Paris January 18, 1908, and Mexico on February 13, 1909.

³⁷ "Whereas, by an act of Congress approved April 25, 1898, it is declared that war exists and that war has existed since the 21st day of April, A. D. 1898, including said day, between the United States of America and the kingdom of Spain; and

"Whereas, it being desirable that such war should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice, it has already been announced that the policy of this government will be not to resort to privateering, but to adhere to the rules of the Declaration of Paris."

Foreign Relations U. S. 1898, p. 772.

statutes and jurisdiction of the navy." Spain did not use privateers during the war. It may be said that at present there seems to be little tendency to return to privateering. The volunteer and auxiliary navy make it possible for a state to utilize its resources in an efficient and regulated manner.

VOLUNTEER, AUXILIARY, OR SUBSIDIZED VESSELS.

134. While privateering is abolished, the private vessels of a state have by various plans been brought into public service in time of war as volunteer, auxiliary, or subsidized vessels.³⁸

As a general proposition it may be maintained that a state should be allowed to use its resources to protect itself in time of war and to preserve its existence. On land a militia is regarded as a perfectly legitimate aid to the regular army, and in extreme cases the levies en masse are recognized as legitimate hostile forces. It is not reasonable to suppose that the resources of the belligerent on the sea will not be summoned to aid in the preservation of state existence. These resources are liable to attack. They will, so far as possible, be called into service. Horses, wagons, railroads, cars, telegraphs, etc., are called into service on land; corresponding agencies will be called into service on the sea.

The owners of German vessels were invited by Prussia, during the Franco-Prussian War of 1870, to fit them out for attack upon French ships of war, for which service large premiums were offered.³⁹ The crews of these vessels were to be furnished by the owners of the vessels, but were to be under naval discipline. The officers were to be in the same uniform as the regular naval officers, and furnished with temporary commissions. The French government protested against this

³⁸ There seems to be, however, no valid objection to the employment in war of vessels of the mercantile marine, provided that they shall have been duly incorporated into the belligerent navy, that their officers hold naval commissions, and that they are under naval orders and discipline. Report Royal Commission on Supply of Food and Raw Material in Time of War, 1905, vol. I, p. 22; The Panama, 176 U. S. 535, 20 Sup. Ct. 480, 44 L. Ed. 577.

³⁹ Royal Prussian Decree, July 24, 1870.

volunteer navy as being a violation of the treaty of Paris, which abolished privateers; but the English government found that there were substantial differences between the proposed vessels and those against which the Declaration of Paris was directed.⁴⁰

The objection to the continuance of privateering was largely due to the lack of government control over those engaged in the practice. This control is easily exercised over those aiding in military operations on land, because a representative of the government is usually at hand to direct the movements.

An equal degree of control may be exercised in the case of volunteer, auxiliary, and subsidized vessels maintained by a government, officered and manned by the paid servants of that government, and operated under its direction. The use of such vessels is a matter of great importance, and there seems to be no reasonable objection to their employment for any and all purposes of naval warfare, provided that the proper degree of government control is maintained.

Several states have volunteer, auxiliary, or subsidized vessels at the present time. The conditions under which these vessels are bound to the respective states vary, and the obligations resting on the vessels also vary.

Russia, fearing a possible conflict in consequence of the situation in the East in 1877-78, considering that her regular fleet would not be adequate and that her merchant marine did not possess vessels easily convertible into vessels suitable for warlike purposes, readily adopted the plan of incorporating into the naval force certain vessels purchased by a private association of patriotic citizens. These vessels were to be under the control of the naval authorities and to be officered by naval commanders. The captain and at least one other officer on each ship is a regular imperial commissioned officer. These vessels are equipped so as to be convertible at once into vessels for warlike use. In time of peace these vessels are principally engaged in public service, though they fly the merchant flag and are privately owned.

France has a direct arrangement with certain companies

⁴⁰ 6 British State Papers, 692.

whereby vessels are constructed on plans approved by the admiralty which make possible the conversion of these vessels into vessels for warlike use. The vessels are commanded by officers of the navy. At the opening of hostilities they may be incorporated in the war fleet.

Great Britain in 1887 concluded agreements with several important steamship companies. In return for an annual subsidy, these companies agree in time of war to turn over certain fast vessels at an appraised valuation and to build ships on plans approved by the admiralty. As the law officers of the British crown were consulted in regard to the legality of the plans of Prussia for a volunteer navy in 1870, it may be supposed that the agreement made in 1887 by the British government does not fail to meet the requirements of legality.

By the act of May 10, 1892, after provisions in regard to registration, tonnage, speed, ownership, etc., it is provided in section 4 as follows:

"That any steamship so registered under the provisions of this act may be taken and used by the United States as cruisers or transports upon payment to the owners of the fair actual value of the same at the time of the taking, and if there shall be a disagreement as to the fair actual value at the time of taking between the United States and the owners, then the same shall be determined by two impartial appraisers, one to be appointed by each of said parties, who, in case of disagreement, shall select a third, the award of any two of the three so chosen to be final and conclusive."⁴¹

The question of commissioning and regulating the activities of volunteer vessels was raised and discussed in consequence of the action in 1904 of the *Smolensk* and the *Peterburg* of the Russian volunteer fleet.⁴²

The Hague Conference of 1907 considered the question of the conversion of merchant ships into war ships and adopted a convention upon this subject:

⁴¹ 27 Stat. 27 (U. S. Comp. St. 1901, p. 2806).

⁴² Int. Law Topics and Discussions, 1906, U. S. Naval War College, 105; Hershey, Int. Law and Diplomacy, Russo-Japanese War, 136; Lawrence, War and Neutrality in Far East (2d Ed.) 204; Smith & Sibley, Int. Law during Russo-Japanese War, 40.

"Article I. A merchant ship converted into a war ship cannot have the rights and duties accruing to such vessels, unless it is placed under the direct authority, immediate control, and responsibility of the power whose flag it flies.

"Article II. Merchant ships converted into war ships must bear the external marks which distinguish the war ships of their nationality.

"Article III. The commander must be in the service of the state and duly commissioned by the competent authorities. His name must figure on the list of the officers of the fighting fleet.

"Article IV. The crew must be subject to military discipline.

"Article V. Every merchant ship converted into a war ship must observe in its operations the laws and customs of wars.

"Article VI. A belligerent who converts a merchant ship into a war ship must, as soon as possible, announce such conversion in the list of war ships."

This convention embodies and makes more definite the principles which have been generally followed in practice since 1870, when Germany made her propositions in regard to a voluntary naval force. It regulates somewhat more carefully the use of such vessels after they are enrolled in the public forces. Many questions arose at the Hague Conference of 1907 which made impossible the formulation of generally acceptable rules on all points in regard to the conversion of merchant ships into war ships. Some of the delegates were absolutely opposed to conversion except in a home port. While some of the delegates were generally opposed to conversion on the high seas, they wished to make exceptions in favor of merchant vessels which had left national ports before the outbreak of hostilities, and in favor of the conversion of merchant vessels captured from the enemy on the high sea and adapted to warlike use. Some thought that the abolition of capture of private property at sea would lead a belligerent to change a ship from a war status to a merchant status, if in danger of capture, in order to bring it under the exemption. Great freedom of conversion and reconversion

was favored by a few of the delegates. The need that the character of a vessel be clear to a neutral was generally maintained.

Upon the question justly regarded as the most difficult, "the question whether the conversion of a merchant ship into a war ship may take place upon the high seas," the contracting powers have been unable to come to an agreement. As the preamble of the seventh convention states, "the question of the place where such conversion is effected remains outside of the scope of this agreement" and is in no way affected by its rules. Thus it is evident that, while provision is made for the abolition of the evils of privateering, there remains for a later conference the agreement upon such difficult questions as those of conditions under which a converted vessel may be reconverted into a war vessel and the place where conversion and reconversion may be allowed.⁴³

The questions of conversion and reconversion were again considered in the International Naval Conference of 1908-09, but it was not possible to reach a solution which would command general support.

⁴³ Wilson, *Conversion of Merchant Ships into War Ships*, 2 A. J. I. 271.

CHAPTER XVII.

RULES OF WAR.

- 135. Regulation of Belligerent Action.
- 136. Prohibited Means.
- 137. Prohibited Methods.
- 138. Special Regulations—Bombardment.
- 139. Submarine Mines and Torpedoes.
- 140. Discharge of Projectiles and Explosives from Balloons.
- 141. Spies.

REGULATION OF BELLIGERENT ACTION.

135. In modern times the range of permissible belligerent action has been gradually defined by domestic regulations, by special conventions, and by general conventions.

In early times there was little or no restriction upon what one belligerent might do to his opponent.

It is now customary for states to issue regulations to their forces for the conduct of hostilities, as was done by both parties to the Russo-Japanese War of 1904. A Japanese regulation in regard to procedure in capturing vessels (article XLII) states that: "The boarding officer, before he leaves the vessel, shall ask the master whether he has any complaint regarding the procedure of visiting or searching, or any other points, and if the master makes any complaints he shall request him to produce them in writing."

There are also treaties between different states in which certain articles are inserted with special reference to the regulation of hostilities.¹ At the Hague Peace Conferences of 1899 and 1907, and at the International Naval Conference at London in 1908-09, general conventions for the regulation of hostilities were agreed upon and to these many states have adhered. There are thus at the present time generally recognized rules for the conduct of hostilities.²

¹ Treaty between United States and Italy, 1871.

² See Conventions in Appendices.

Gradually there arose a feeling, stimulated by the influence of the age of chivalry, that even the conduct of war should be regulated. Provisions of treaties were drawn with view that they should become effective on the outbreak of war. States made declarations in regard to the course which they would pursue under given circumstances. The necessity of fixed rules was particularly evident during the early years of the Civil War in the United States. Vast armies were gathered. Many leaders were naturally unacquainted with the laws and customs of war, and the decisions in different parts of the great area of operations were often conflicting. After two years of warfare the Secretary of War requested Professor Francis Lieber to prepare a code of rules for the use of the armies. There were not at that time conventional agreements as to the rules of warfare. Dr. Lieber prepared a body of rules numbering one hundred and fifty-seven. These articles were submitted to a board of officers, and on April 24, 1863, issued as General Order No. 100.³ These rules were particularly aimed to cover a condition of civil war. They were, however, so equitable in spirit that they have been widely accepted as the standard statement of what the rules of war upon land should be. The rules published under General Order No. 100, in 1863, as "Instructions for the Government of Armies of the United States in the Field," were issued without change for the government of the army of the United States in the Spanish-American War of 1898. These rules strongly influenced the form of later codes.

Count von Moltke, on December 11, 1880, writing on the proposed Oxford Manual of Laws of War, said:

"Perpetual peace is a dream, and it is not even a beautiful dream. War is an element in the order of the world ordained by God. In it the noblest virtues of mankind are developed—courage and the abnegation of self, faithfulness to duty, and the spirit of sacrifice. The soldier gives his life. Without war the world would stagnate, and lose itself in materialism. * * * I am of opinion that in war, where everything must be individual, the only articles which will prove efficacious are those which are addressed specifically to commanders. Such

³ Appendix, p. 488.

are the rules of the manual relating to the wounded, the sick, the surgeons, and medical appliances."

In his reply to Count von Moltke's letter, Professor Bluntschli says:

"The administration of the law of war ought therefore to be intrusted primarily to the state which wields the public power in the place where an offense is committed. No state will lightly, and without unpleasantness and danger, expose itself to a just charge of having neglected its international duties. It will not do so even when it knows that it runs no risk of war on the part of neutral states. Every state, even the most powerful, will gain sensibly in honor with God and man if it is found to be faithful and sincere in respect and obedience to the law of nations.

"Should we be deceiving ourselves if we admitted that a belief in the law of nations, as in a sacred and necessary authority, ought to facilitate the enforcement of discipline in the army and help to prevent many faults and many harmful excesses? I, for my part, am convinced that the error, which has been handed down to us from antiquity, according to which all law is suspended during war, and everything is allowable against the enemy nation—that this abominable error can but increase the unavoidable sufferings and evils of war without necessity, and without utility from the point of view of that energetic way of making war which I also think is the right way."⁴

Within twenty years from the date of Count von Moltke's letter the states of the world had at the Hague Conference agreed upon rules for warfare far more detailed than those proposed in the Oxford Manual.

PROHIBITED MEANS.

136. In general the prohibited means of injuring the enemy include—

- (a) Such instruments or weapons as cause unnecessary suffering.**
- (b) Such as constitute hidden peril or are uncertain in their effect.**

⁴ Holland, *Letters on War and Neutrality*, pp. 25–29.

While in early days it was a maxim that "all was fair in war," this has long since ceased to be the case, and the use of certain instruments or means of injuring the enemy is positively prohibited. Means of warfare which are new or mysterious have often been prohibited or looked upon with disfavor for a period.⁵ Maine says: "One of the most curious passages of the history of armament is the strong detestation which certain inventions of warlike implements have in all centuries provoked, and the repeated attempts to throw them out of use by denying quarter to the soldiers who use them. The most unpopular and detested of weapons was once the crossbow, which was really a very ingenious scientific invention. The crossbow had an anathema put on it, in 1139, by the Lateran Council, which anathematized *artem illam mortifera et Deo odibilem*. The anathema was not without effect. Many princes ceased to give the crossbow to their soldiers, and it is said that our Richard I revived its use with the result that his death by a crossbow bolt was regarded by a great part of Europe as a judgment. It seems quite certain that the condemnation of the weapon by the Lateran Council had much to do with the continued English employment of the older weapon, the longbow, and thus the English successes in the war with France. But both crossbow and longbow were before long driven out of employment by the musket, which is in reality a smaller and much improved form of the cannon that at an earlier date were used against fortified walls. During two or three centuries all musketeers were most severely, and as we should now think most unjustly, treated. The Chevalier Bayard thanked God in his last days that he had ordered all musketeers who fell into his hands to be slain without mercy. He states expressly that he held the introduction of firearms to be an unfair innovation on the rules of lawful war. Red-hot shot was also at first objected to, but it was long doubtful whether infantry soldiers carrying the musket were entitled to quarter. Marshal Mont Luc, who has left Memoirs behind him, expressly declares that it was the usage of his day that no musketeer should be spared."⁶

⁵ Nys, *Les Origines du Droit Int.* p. 192.

⁶ Maine, *Int. Law*, p. 183.

(a) The use of poisoned weapons is generally prohibited. The use of arms or projectiles which cause unnecessary suffering is also prohibited. Such projectiles as copper bullets, or explosive or expanding bullets, are of this class. Barbed bayonets, lances with detachable heads, etc., are regarded as instruments causing unnecessary suffering.⁷

(b) The use of poison, the launching of projectiles from balloons, and the use of certain submarine mines and torpedoes is contrary to conventional agreements.⁸

A declaration which has been signed by all the states represented at the First Hague Peace Conference except the United States is to the effect that "the contracting powers agree to abstain from the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases." Captain (Admiral) Mahan explains the opposition to the declaration by the United States representatives as follows:

"As a certain disposition has been observed to attach odium to the view adopted by this commission in this matter, it seems proper to state, fully and explicitly, for the information of the government, that on the first occasion of the subject arising in subcommittee, and subsequently at various times in full committee and before the conference, the United States naval delegate did not cast his vote silently, but gave the reasons, which at his demand were inserted in the reports of the day's proceedings. These reasons were, briefly: (1) That no shell emitting such gases is as yet in practical use, or has undergone adequate experiment, consequently a vote taken now would be taken in ignorance of the facts as to whether the results would be of a decisive character, or whether injury in excess of that necessary to attain the end of warfare—the immediate disabling of the enemy—would be inflicted. (2) That the reproach of cruelty and perfidy, addressed against these supposed shells, was equally uttered formerly against firearms and torpedoes, both of which are now employed without scruple. Until we knew the effects of such asphyxiating

⁷ Laws and Customs of War on Land, article XXIII, Appendix, p. 541.

⁸ *Id.*; Discharge of Projectiles and Explosives from Balloons, post, p. 326; Submarine Contact Mines, post, p. 324.

shells, there was no saying whether they would be more or less merciful than missiles now permitted. (3) That it was illogical and not demonstrably humane to be tender about asphyxiating men with gas, when all were prepared to admit that it was allowable to blow the bottom out of an ironclad at midnight, throwing 400 or 500 into the sea, to be choked by water, with scarcely the remotest chance to escape. If, and when, a shell emitting asphyxiating gases alone has been successfully produced, then, and not before, men will be able to vote intelligently on the subject.”⁹

PROHIBITED METHODS.

137. In general, the prohibited methods of injuring the enemy include—

(a) Acts involving perfidy or treachery.

(b) Acts causing suffering or damage disproportionate to the military ends secured.

(a) Acts involving perfidy or treachery are in general forbidden, though ruses of war and deceit not involving perfidy are allowed.¹⁰ It is forbidden to kill or wound individuals of the enemy's forces by treachery, to misuse the flag of truce or the Red Cross flag, or to make false use of the national flag or military insignia of the enemy in war on land, though the use of enemy or of false colors in maritime warfare is not prohibited. The prohibition of the use of false colors at sea has been strongly urged.¹¹

(b) Many acts formerly allowed are now prohibited as causing suffering or damage disproportionate to the military ends secured. Such acts include refusal of quarter, killing of enemy who has surrendered, unnecessary destruction of enemy property, pillage, confiscation of private property, or bombardment of undefended places, except in maritime war, when reasonable requisitions are refused. The belligerent is forbidden

⁹ Holls, Peace Conference at The Hague, p. 494.

¹⁰ Laws and Customs of War on Land, articles XXIII, XXIV, Appendix, p. 541.

¹¹ Int. Law Topics and Discussions, U. S. Naval War College, 1906, pp. 7-20.

to compel nationals of the enemy to take part in war against their own state, to furnish information in regard to the means of defense, or to swear allegiance to a hostile state. The belligerent is also bound to respect the personal rights of the nationals of the enemy state as to family honor, property, religion, etc. These prohibitions are quite fully set forth in the Hague Conventions of 1907.

SPECIAL REGULATIONS—BOMBARDMENT.

138. (a) Bombardment of undefended towns or buildings by land forces is prohibited.

(b) Bombardment of undefended towns or buildings by naval forces, except when reasonable requisitions for necessary supplies are refused, is prohibited.

(c) In all cases of bombardment, whether of defended or undefended places, due care should be taken to restrict the action to military ends.

(a) The rules for land warfare prescribe that "the attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended, is prohibited."¹²

(b) Similarly the bombardment of undefended towns and buildings by naval forces is forbidden. The presence of submarine contact mines off the harbor is not regarded as sufficient cause for bombardment. The destruction of military resources by bombardment, if they cannot otherwise be reached, is permitted. The refusal of money contributions is not a sufficient cause for bombardment, though the failure to comply with a request for a reasonable amount of supplies necessary at the time may be a cause for bombardment by naval forces.¹³

(c) Nonmilitary buildings, etc., are liable to the damages incident to bombardment. The action is, however, carefully regulated by convention:

"Article V. In bombardments by naval forces all the necessary measures must be taken by the commander to spare

¹² Hague Convention, Laws and Customs of War on Land, article XXV, Appendix, p. 541.

¹³ See Hague Conventions, 1907, Bombardment by Naval Forces in Time of War, Scott, Peace Conferences, p. 261.

as far as possible sacred edifices, buildings used for artistic, scientific, or charitable purposes, historic monuments, hospitals, and places where the sick or wounded are collected, on the understanding that they are not used at the same time for military purposes.

"It is the duty of the inhabitants to indicate such monuments, edifices, or places by visible signs, which shall consist of large fixed rectangular panels divided diagonally into two colored triangular portions, the upper portion black, the lower portion white."

"Article VI. If the military situation permits, the commander of the attacking naval force, before commencing the bombardment, must do his utmost to warn the authorities."¹⁴

SAME—SUBMARINE MINES AND TORPEDOES.

139. By the Hague Convention of 1907, it is forbidden:

- "(a) To lay unanchored automatic contact mines, except when they are so constructed as to become harmless one hour at most after the person who laid them ceases to control them.**
- "(b) To lay anchored automatic contact mines which do not become harmless as soon as they have broken loose from their moorings.**
- "(c) To use torpedoes which do not become harmless when they have missed their mark."**

There was much discussion as to the propriety of the use of torpedoes when that method of warfare was first introduced. As soon, however, as it was assured that the belligerent could control the action of the torpedo to a reasonable degree, the opposition disappeared.

There has been a like opposition to the use of submarine mines. The subject of the use of submarine mines was considered at the Hague Conference in 1899, and again in 1907. The Second Conference reached the conclusion embodied in the Convention Relative to the Laying of Automatic Contact Submarine Mines, prohibiting the laying of such mines except under condition that by construction they would, if unanchored, become harmless one hour after they ceased to be un-

¹⁴ *Id.* p. 263.

der control, or would, if anchored, become harmless on breaking adrift. The laying of such mines was also prohibited when the sole purpose was to intercept commercial shipping. The convention also prohibited the use of torpedoes "which do not become harmless when they have missed the mark."

The aim of this convention is to remove the dangers from peaceful navigation without unduly limiting belligerent operations. Neutral powers are also permitted to lay mines during war under restrictions. Provision is made for the removal of mines at the close of war. A large degree of freedom in matter of construction is allowed for a time, because states not having mines of the pattern contemplated in the convention are merely "to convert the material of their mines as soon as possible, so as to bring it into conformity with the foregoing requirements."¹⁵

This convention has been widely criticised and was not wholly satisfactory to those who signed. Westlake says of the use of floating mines: "There is no certainty that floating mines, even if anchored at first, will not get loose, nor even much probability that a large percentage will not get loose. Thus the employment by a belligerent, even in his own territorial waters, or in those of his enemy, which merchantmen may be expected to avoid during war, of contact mines which do not become innocuous as soon as they get loose, is a cause, lying well within the limits of human foresight, of slaughter and damage to peaceable neutrals engaged in their lawful occupations in waters where they have a perfect right to be. During all the two years which have elapsed since the close of the Russo-Japanese War, the seas of the Far East have continued to be the scene of disasters which the employment of such mines in that contest has caused to peaceful shipping and fishermen. Now the right of a state in the waters subject to its sovereignty can certainly not rank higher than that of a private owner in the land or water which is his property. Still less, if possible, can the right of a state in the open sea, which is free to the use of all, rank higher than that of property. But no principle is more firmly established in the science of law than that which says to an owner, 'sic utere tuo ut

¹⁵ Id. p. 255, Hague Convention, 1907, Submarine Contact Mines.

alienum non lædas.' The right of sovereignty, therefore, does not extend to employing anywhere what may be foreseen to be engines of slaughter and damage to unoffending foreigners. The foreign government whose subjects suffer from such engines does not need to inquire whether their use is prohibited by any positive rule of international law, whether resting on recognized custom or an agreement. They are indefensible in themselves, and the foreign government concerned will be justified, not only in taking up the cause of its injured subjects, but it will not have exceeded its rights if it interferes in order to stop the offending methods of war."¹⁶

The belligerent action during the Russo-Japanese War emphasized the need of control of the use of submarine mines. The Chinese delegate at the Second Hague Convention reported that it was estimated that five hundred or six hundred Chinese had lost their lives by the sinking of many small Chinese vessels which had, in spite of all precautions and while innocently employed, run upon mines that were adrift.¹⁷

The Hague Convention Relative to the Laying of Automatic Contact Submarine Mines, of 1907, provides only in part for the regulation of this means of warfare. Many states are in favor of additional restrictions, particularly in order that neutral interests may be more effectively protected.

SAME—DISCHARGE OF PROJECTILES AND EXPLOSIVES FROM BALLOONS.

- 140. The Second Hague Peace Conference prohibited "for a period extending to the close of the Third Conference, the discharge of projectiles and explosives from balloons or by other new methods of a similar nature."**

This declaration in regard to the use of balloons and other new methods of warfare of similar nature is a renewal of the declaration to the same effect adopted by the First Peace Conference in 1899, to continue for a period of five years from July 29, 1899. The term, therefore, expired during the

¹⁶ Westlake, *Int. Law*, pt. II, War, p. 322.

¹⁷ 3 La Deuxième Conférence, p. 663.

Russo-Japanese War on July 29, 1904; but neither party to that war used balloons for such purposes. The present declaration is to continue effective to the close of the Third Peace Conference,¹⁸ which the Second Peace Conference recommended should be assembled after a period corresponding to that between the First and Second Conferences.

The declaration in regard to the use of balloons is, of course, binding only upon the signatory powers, and several of the more important states of the world do not seem inclined to bind themselves, even till the close of the Third Peace Conference, and have refrained from signing.

SPIES.

141. A spy is a person who, acting clandestinely or under false pretenses, obtains or endeavors to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the enemy.¹⁹

The aim of this regulation is to define the class who, because acting in a manner especially dangerous to a belligerent, are liable to special treatment. This may be death by hanging. No penalty shall be inflicted without previous trial, nor if the spy is captured after rejoining his army. To act as a spy is not necessarily regarded as dishonorable, but is to act at risk of extreme penalty. Those who obtain information openly in their proper persons as soldiers in proper uniform, persons in balloons, or a bearer of a flag of truce, who reports what he observes without effort to spy, are not liable to treatment as spies.

Treatment as spies was threatened by Prussian officers to those obtaining information by means of balloons in the Franco-Prussian War in 1870, and by the Russian Admiral Alexeiff in the Russo-Japanese War in 1904 to those "communicating war news to the enemy by means of improved apparatus for which provision has not yet been made in existing

¹⁸ Hague Declaration, 1907, Discharging Projectiles from Balloons.

¹⁹ Hague Convention, 1907, Laws and Customs of War on Land, articles XXIX-XXXI, Appendix, p. 542.

conventions." While certain balloonists captured in 1870 were severely treated, they were not condemned as spies. The position assumed in the Russian declaration of 1904 was generally opposed, and no one was treated as a spy under its provisions. It may be said that there is lacking in such cases the essential element of clandestine conduct.

CHAPTER XVIII.

MILITARY OCCUPATION AND GOVERNMENT.

- 142. Military Occupation.
- 143. Military Government.
- 144. Exercise of Military Authority in Occupied Territory.
- 145. Martial Law.
- 146. Military Law, Courts-Martial, etc.
- 147. Cessation of Military Control.

HOSTILE MILITARY OCCUPATION.

- 142. The effective holding by a hostile military force of a territory of the enemy constitutes hostile military occupation.**

Military occupation should be distinguished from conquest and from military control.

"The term 'conquest,' as it is ordinarily used, is applicable to conquered territory the moment it is taken from the enemy; but, in its more limited and technical meaning, it includes only the real property to which the conqueror has acquired a complete title. Until the ownership of such property so taken is confirmed or made complete, it is held by the right of military occupation (*occupatio bellica*), which, by the usage of nations and the laws of war, differs from, and falls short of, the right of complete conquest (*debellatio, ultima victoria*)."¹

Military control implies simply the exercise of authority by the military force rather than by civil officials. Military control may, and often does, continue after an occupied territory has been ceded to the enemy which occupied it, as in the case of Porto Rico after the treaty of peace between Spain and the United States in 1898.²

Military occupation is an incident of war, and as such is not political in its effects.³ It does not transfer sovereignty, but

¹ 2 Halleck, *Int. Law* (4th Ed.) p. 465.

² *Dooley v. United States*, 182 U. S. 222, 21 Sup. Ct. 762, 45 L. Ed. 1074.

³ See Magoon, *The Law of Civil Government under Military Occupation*; 1 Moore, *Int. Law Digest*, § 21; 7 Id., §§ 1143-1155; 2 Halleck, *Int. Law*, c. XXXIII.

gives to the invading force the right to exercise control for the period of occupation.⁴ The nature and extent of this control will be determined by circumstances, as by the proximity of the occupied territory to the seat of hostilities. Formerly no distinction was made between occupation and conquest. Early writers regarded effective occupation as equivalent to the acquisition of title to a region, and did not consider a treaty or other sanction as essential. Pufendorf discusses this matter fully, and argues that the sovereignty must be established by other means than simple exercise of force, which is simply a physical fact, which may or may not have a political significance.⁵ Writers of the eighteenth century began to differentiate conquest and occupation. They maintained that the inhabitants of the occupied territory should not be treated as enemies, but as subjects for the time being.⁶ In 1815 a judgment of the Supreme Court of the United States affirmed that, "although acquisitions made during war are not considered as permanent until confirmed by treaty, yet to every commercial and belligerent purpose they are considered as a part of the domain of the conqueror, so long as he retains the possession and government of them."⁷ According to a decision of the same court in 1901, during military occupation military authority supersedes civil authority to the extent deemed necessary and in accord with the laws of war.⁸

According to the Hague Convention of 1907: "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised."⁹

Military occupation is therefore a question of fact, because one or the other state must be competent to exercise authority.

⁴ *Downes v. Bidwell*, 182 U. S. 345, 21 Sup. Ct. 770, 45 L. Ed. 1088.

⁵ Pufendorf, *De Jure Natural*, bk. VII, c. VII, 3ff.

⁶ Wolf, *Institutiones Juris Natural et Gentium*, MCCIV; Vattel, *Le Droit de Gens*, § 197ff.

⁷ *Thirty Hogsheads of Sugar v. Boyle*, 9 Cranch, 191, 3 L. Ed. 701.

⁸ *Dooley v. United States*, 182 U. S. 222, 21 Sup. Ct. 762, 45 L. Ed. 1074.

⁹ Hague Convention, 1907, *Laws and Customs of War on Land*, art. XLII, Appendix, p. 543.

If the hostile army is in control, it is within the authority of that belligerent to govern the region over which it has in fact the power.¹⁰

As the military occupation is a fact, the beginning and ending of military occupation is determined by the presence or absence of an effective military force in a hostile territory, or by a treaty which fixes the status of the occupied territory. When military force is withdrawn, the occupation ceases, and the national government assumes sway. When a treaty transfers an occupied territory to the sovereign of the occupying forces, military occupation ceases, though the military forces may remain, and military control may continue.

MILITARY GOVERNMENT.

143. The organization through which the authority is exercised in a region under military occupation constitutes the military government.

"Military government—that is, the administration of the affairs of civil government exercised by a belligerent in territory of an enemy occupied by him—is not considered in modern times as doing away with all laws and substituting therefor the will of a military commander. Such government is considered as a new means or instrument for the execution of such laws, natural and enacted, international and domestic, as are necessary to preserve the peace and order of the community, protect rights, and promote the war to which it is an incident.

"Under any government, if for any reason the usual and ordinary means of enforcing the laws and accomplishing the purposes of government are found inadequate to meet an existing emergency, resort may be had to martial rule, in order to enforce the law and accomplish the purposes of government. Martial rule is intended to effectuate some law, not to abrogate all law. To illustrate: Private property may be taken or injured for public purposes. Ordinarily this is accomplished by the slow process of condemnation. Under

¹⁰ United States v. Rice, 4 Wheat. 246, 4 L. Ed. 562.

martial rule the process is accelerated. If the necessity apparently exists, as in the presence of a conflagration, a building may be summarily destroyed, or trespass committed without liability. Again, a man's life may be taken if he is guilty of treason. Under the ordinary administration of the law the most notoriously guilty individual, captured red-handed, must be proceeded against by the slow process of the court. Under martial rule he is incontinently executed. It is the procedure which is dispensed with, not the law.

"While a military government continues as an instrument of warfare, used to promote the objects of the invasion by weakening the enemy or strengthening the invader, its powers are practically boundless."¹¹

The military authorities, in the exercise of their governmental functions, may in general perform such administrative functions under the laws of war as are by them deemed expedient. Legislative and other powers are, however, limited to strict necessity.¹²

Halleck says: "The government established over an enemy's territory during its military occupation may exercise all the powers given by the laws of war to the conqueror over the conquered, and is subject to all the restrictions which that code imposes. It is of little consequence whether such government be called a military or a civil government. Its character is the same, and the source of its authority the same. In either case it is a government imposed by the laws of war, and so far as it concerns the inhabitants of such territory, or the rest of the world, those laws alone determine the legality or illegality of its acts. But the conquering state may, of its own will, whether expressed in its constitution, or in its laws, impose restrictions additional to those established by the usage of nations, conferring upon the inhabitants of the territory so occupied privileges and rights to which they are not strictly entitled by the laws of war; and, if such government of military occupation violate these additional restrictions so imposed, it is

¹¹ Magoon, *The Law of Civil Government under Military Occupation*, p. 14; *United States v. Diekelman*, 92 U. S. 520, 23 L. Ed. 742.

¹² *Dooley v. United States*, 182 U. S. 234, 21 Sup. Ct. 762, 45 L. Ed. 1074.

accountable to the power which established it, but not to the rest of the world.”¹³

The Hague Convention of 1907 provides that:

“The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”¹⁴

Professor Westlake says that the above provision of the Hague Convention “indicates that the law to be enforced by the occupant consists, first, of the territorial law in general, as that which stands to the public order and social and commercial life of the district in a relation of mutual adaptation, so that any needless displacement of it would defeat the object which the invader is enjoined to have in view, and, secondly, of such variations of the territorial law as may be required by real necessity and are not expressly prohibited by any of the further rules which will come before us. Such variations will naturally be greatest in what concerns the relation of the communities and individuals within the district to the invading army and its followers; it being necessary for the protection of the latter, and for the unhindered prosecution of the war by them, that acts committed to their detriment shall not only lose what justification the territorial law might give them as committed against enemies, but shall be repressed more severely than the territorial law would repress acts committed against fellow subjects. Indeed, the entire relation between the invaders and the invaded, so far as it may fall within the criminal department, whether by the intrinsic nature of the acts done or in consequence of the regulations made by the invaders, may be considered as taken out of the territorial law and referred to what is called martial law.”¹⁵

An executive order of the President of the United States to the Secretary of War, May 19, 1898, during the Spanish-American War gives a statement of the point of view of the

¹³ 2 Halleck, *Int. Law* (4th Ed.) p. 466.

¹⁴ Hague Convention, 1907, *Laws and Customs of War on Land*, art. XLIII, Appendix, p. 543.

¹⁵ Westlake, *Int. Law*, p. 42; *War*, p. 86.

United States. "The first effect of the military occupation of the enemy's territory is the severance of the former political relations of the inhabitants and the establishment of a new political power. Under this changed condition of things the inhabitants, so long as they perform their duties, are entitled to security in their persons and property and in all their private rights and relations. It is my desire that the people of the Philippines should be acquainted with the purpose of the United States to discharge to the fullest extent its obligations in this regard. It will therefore be the duty of the commander of the expedition, immediately upon his arrival in the islands, to publish a proclamation declaring that we come, not to make war upon the people of the Philippines, nor upon any party or faction among them, but to protect them in their homes, in their employments, and in their personal and religious rights. All persons who, either by active aid or by honest submission, co-operate with the United States in its efforts to give effect to this beneficent purpose, will receive the reward of its support and protection. Our occupation should be as free from severity as possible."¹⁶

EXERCISE OF MILITARY AUTHORITY IN OCCUPIED TERRITORY.

144. In the exercise of military authority in an occupied territory the occupant in general—

- (a) Is under obligation to insure so far as possible the security of the occupied territory.**
- (b) Is forbidden to violate the personal rights of the inhabitants.**
- (c) Is permitted to exercise restraint over persons and to use property to the extent necessary and allowed by the laws of war.**

The Hague Convention, 1907, Respecting the Laws and Customs of War on Land, which is a revision of the convention of 1899 upon the same subject, contains specific regulations in section III in regard to exercise of military authority.

(a) This convention provides that the occupant shall so far as possible secure public order, respect the laws, and carry on

¹⁶ 10 Messages and Papers of Presidents, p. 209.

the administration of the occupied territory.¹⁷ Being in control, the occupant would for his own sake maintain public order. Not all laws would flourish during a period of military occupancy. Laws relating to political relations would in general be suspended during occupancy, because the political power which would enforce these laws is for the time in abeyance. Local laws regulating private relations are continued, unless regarded as detrimental to the occupant. Ordinary laws of trade, local taxes, registration of marriages, births, and deaths, and other laws not affecting the military occupant, are usually operative.

(b) By this convention the occupant is forbidden to compel the inhabitants of the territory to swear allegiance to the hostile power or to furnish military information. He is forbidden to violate personal or property rights of individuals. This prohibition extends to religious convictions and to the confiscation or pillage of private property. He is also under obligations to treat the property of municipalities and of institutions devoted to the welfare of humanity as private property.¹⁸ Article 44 of the convention, providing that "any compulsion on the population of occupied territory to furnish information about the army of the other belligerent or about his means of defense is forbidden," has been a subject of discussion, owing to the difference of interpretation. Some maintained that under this article inhabitants of an occupied country might be forced to act as guides for the enemy. Article 23 forbids, however, a belligerent "to compel the nationals of the adverse party to take part in the operations of war directed against their country."¹⁹

(c) The occupant is permitted to levy contributions or make requisitions upon the inhabitants in case of need. In such cases receipts must be given. He may take possession of public property, which may be used for military operations, and as administrator enjoy the use of other public property, but must preserve the capital.²⁰ In article 53 the army of occu-

¹⁷ Articles XLIII, XLVIII, Appendix, p. 543.

¹⁸ Articles XLIV-XLVI, L, LVI, Appendix, pp. 543, 544.

¹⁹ See Lémonon, *La Second Conférence de la Paix*, p. 358ff; German Weissbuch, No. 527 (1907) p. 7.

²⁰ Id. arts. XLIX, LI-LV, Appendix, p. 544.

pation is permitted to take possession of valeurs exigibles, "realizable securities," belonging to the state, which is regarded as including obligations already payable or such as may become payable during the period of occupation. This expression has been differently translated, and Professor Holland regards it as intentionally ambiguous.²¹ Hall, quoting with approval Heffter and Phillimore, says: "According to them, incorporeal things can only be occupied by actual possession of the subject to which they adhere. When territory is occupied, there are incorporeal rights, such as servitudes, which go with it, because they are inherent in the land. But the seizure of instruments or documents representing debts has not an analogous effect. They are not the subject to which the incorporeal right adheres. They are merely the evidence that the right exists, 'or, so to speak, the title deeds of the obligee.' The right itself arises out of the purely personal relations between the creditor and the debtor; it inheres in the creditor. It is only, consequently, when a belligerent is entitled to stand in the place of his enemy for all purposes—that is to say, it is only when complete conquest has been made, and the identity of the conquered state has been lost in that of the victor—that the latter can stand in its place as a creditor, and gather in the debts which are owing to it."²²

"Submarine cables, connecting an occupied territory with a neutral territory, shall not be seized or destroyed, except in the case of absolute necessity. They must likewise be restored, and compensation fixed, when peace is made."²³

An illustration of the application of the principles for the exercise of military authority in an occupied territory is shown in the executive order of President McKinley to the Secretary of War on May 19, 1898, relating to the occupation of the Philippines by United States forces. A portion of the order particularly applicable is as follows:

"Though the powers of the military occupant are absolute and supreme, and immediately operate upon the political con-

²¹ Holland, *Laws and Customs of War on Land*, p. 78.

²² Hall, *Int. Law* (5th Ed.) p. 421. See, also, Heffter, § 134; Calvo, § 1977; 2 Rivier, *Principes*, 307.

²³ Article LIV, Appendix, p. 544.

dition of the inhabitants, the municipal laws of the conquered territory, such as affect private rights of person and property and provide for the punishment of crime, are considered as continuing in force, so far as they are compatible with the new order of things, until they are suspended or superseded by the occupying belligerent; and in practice they are not usually abrogated, but are allowed to remain in force and to be administered by the ordinary tribunals, substantially as they were before the occupation. This enlightened practice is, so far as possible, to be adhered to on the present occasion. The judges and the other officials connected with the administration of justice may, if they accept the authority of the United States, continue to administer the ordinary law of the land as between man and man under the supervision of the American commander in chief. The native constabulary will, so far as may be practicable, be preserved. The freedom of the people to pursue their accustomed occupations will be abridged only when it may be necessary to do so.

"While the rule of conduct of the American commander in chief will be such as has just been defined, it will be his duty to adopt measures of a different kind if, unfortunately, the course of the people should render such measures indispensable to the maintenance of law and order. He will then possess the power to replace or expel the native officials in part or altogether, to substitute new courts of his own constitution for those that now exist, or to create such new or supplementary tribunals as may be necessary. In the exercise of these high powers the commander must be guided by his judgment and his experience and a high sense of justice.

"One of the most important and most practical problems with which the commander of the expedition will have to deal is that of the treatment of property and the collection and administration of the revenues. It is conceded that all public funds and securities belonging to the government of the country in its own right and all arms and supplies and other movable property of such government may be seized by the military occupant and converted to the use of this government. The real property of the state he may hold and administer, at the same time enjoying the revenues thereof; but he is not to

destroy it, save in the case of military necessity. All public means of transportation, such as telegraph lines, cables, railways, and boats belonging to the state may be appropriated to his use; but, unless in case of military necessity, they are not to be destroyed. All churches and buildings devoted to religious worship and to the arts and sciences, all schoolhouses, are, so far as possible, to be protected, and all destruction or intentional defacement of such places, of historical monuments or archives, or of works of science or art, is prohibited, save when required by urgent military necessity.

"Private property, whether belonging to individuals or corporations, is to be respected, and can be confiscated only as hereafter indicated. Means of transportation, such as telegraph lines and cables, railways, and boats, may, although they belong to private individuals or corporations, be seized by the military occupant; but, unless destroyed under military necessity, are not to be retained.

"While it is held to be the right of a conqueror to levy contributions upon the enemy in their seaports, towns, or provinces which may be in his military possession by conquest, and to apply the proceeds to defray the expenses of the war, this right is to be exercised within such limitations that it may not savor of confiscation. As the result of military occupation the taxes and duties payable by the inhabitants to the former government become payable to the military occupant, unless he sees fit to substitute for them other rates or modes of contribution to the expenses of the government. The moneys so collected are to be used for the purpose of paying the expenses of government under the military occupation, such as the salaries of the judges and the police, and for the payment of the expenses of the army.

"Private property taken for the use of the army is to be paid for when possible in cash at a fair valuation, and when payment in cash is not possible receipts are to be given." ²⁴

²⁴ 10 Messages and Papers of Presidents, p. 209.

MARTIAL LAW.**145. Martial law is the law in accordance with which military authority is exercised.**

Martial law becomes operative when a hostile territory is occupied by the enemy. It does not suspend or supersede local laws, except so far as necessary.²⁵ Martial law is not a justification for oppression or other arbitrary action, and a commander thus exercising his authority is liable to penalty.²⁶ "What is called 'declaration of martial law' is the mere announcement of a fact; it does not and cannot create that fact. The exigencies which, in any particular place, justify the taking of human life without the interposition of the civil tribunals, and without the authority of the civil law, may justify the suspension of the power of such tribunals and the substitution of martial law. The law of war, or at least many of its rules, are merely the results of a paramount necessity."²⁷ Martial law may be proclaimed in the time of peace, when for any reason the regular course of administration is so disturbed as to make it necessary, as in time of great disaster by fire, or earthquake.

General Davis says: "Martial law, or, to speak more correctly, military rule, or the law of hostile occupation, is a term applied to the government of an occupied territory by the commanding general of the invading force. Martial law also prevails in the immediate theater of operations of an army in the field. The reason in both cases is the same. The ordinary agencies of government, including the machinery provided for the prevention and punishment of crime, are suspended by the fact of war. This suspension takes place at a time when society is violently disturbed, when the usual restraints of law are at a minimum of efficiency, and when the need of such restraints is the greatest possible. This state of affairs is the direct result of the invasion, or occupation, of the disturbed territory by an enemy. The only organized power capable of

²⁵ *Dow v. Johnson*, 100 U. S. 158, 25 L. Ed. 632.

²⁶ *Luther v. Borden*, 7 How. 1, 12 L. Ed. 581.

²⁷ 1 Halleck, *Int. Law* (4th Ed.) p. 599.

restoring and maintaining order is that of the invading force, which is vested in its commanding general. Upon him, therefore, international law places the responsibility of preserving order, punishing crime, and protecting life and property within the limits of his command. His power in the premises is equal to his responsibility. In cases of extreme urgency, such as arise after a great battle, or the capture of a besieged place or a defended town, he may suspend all law, and may punish crimes summarily, or by tribunals of his own constitution."²⁸

MILITARY LAW, COURTS-MARTIAL, AND MILITARY COMMISSIONS.

146. Military law, courts-martial, and military commissions are particularly concerned with offenses against military discipline or good order.

Military law may and does exist in time of peace and in time of war. Military law is the law for the government of military forces. As such forces are called upon to perform duties in behalf of the state, a soldier may sometimes, under orders, act in a manner which might render an ordinary civilian liable before a civil court, but which would be the proper action under military law. It would be manifestly inexpedient to allow local authorities to assume jurisdiction over offenses which might take place within the limits of a military post. Indeed, for offenses against certain military regulations there might be no provision in the local law.

Offenses against military law are tried as the law may prescribe, but usually by courts-martial instituted for the purpose. The sentence of such a court must also be in accord with law, and when proceedings of such a court have been regular and sentence proper the civil courts decline to take jurisdiction,²⁹ and in general civil courts will review the findings of a court-martial only to ascertain whether the court acted within its proper competence.³⁰

²⁸ Davis, *Elements of Int. Law* (3d Ed.) p. 333.

²⁹ *Dynes v. Hoover*, 20 How. 65, 15 L. Ed. 838.

³⁰ *Carter v. McClaghry*, 183 U. S. 365, 22 Sup. Ct. 181, 46 L. Ed. 236. See discussion of jurisdiction of court-martial in *Case of Wal-*

Offenses not provided for in the military law may be brought before a military commission, which may recommend to the commanding officer a suitable punishment. Such commissions are usually appointed for special cases. "In the war between the United States and the Republic of Mexico, it was found that no provisions had been made in the United States Rules and Articles of War for numerous cases, civil and criminal, between the citizens of the United States and between such citizens and foreigners, in Mexican territory occupied by the troops of, but without the jurisdiction of any court of, the United States. All such cases, of a criminal character, arising in the territory of Mexico occupied by the 'main army' under General Scott, were referred by him to 'military commissions,' which were special tribunals constituted and appointed for that purpose. In California they were usually left to be decided by the ordinary tribunals of the country, although special tribunals were there organized, in a few special cases, by the government of military occupation."³¹

CESSATION OF HOSTILE MILITARY OCCUPATION AND OF MILITARY CONTROL.

147. Hostile military occupation ceases when the effective military force is withdrawn from a hostile territory, or on the conclusion of peace.

Military control ceases when and to the extent that the regular civil government is restored.

Military occupation in the strict sense is a term applicable only in time of war, and is the effective holding by force of an enemy territory. This would cease in fact when the force is withdrawn, and would cease from a legal point of view when by treaty of peace the war is at an end.

The term "military occupation" is also used in a loose sense to designate exercise of authority through the military forces after peace is restored and before a regular government is established. The object of the continued maintenance of a mili-

ler, Foreign Relations U. S. 1895, p. 304, and index "Arrest of J. L. Waller."

³¹ 2 Halleck, Int. Law (4th Ed.) p. 474.

tary force in a territory after the close of war is in general not such as to bring it within the scope of international law of war. As Magoon says of Porto Rico and of Cuba after the Spanish-American War:

"Upon the ratifications of the treaty of peace being exchanged, the sovereignty and jurisdiction of the United States permanently attached to Porto Rico, and the island became territory appertaining to the United States. The United States is in undisputed possession of the island, and therefore the military government of Porto Rico has ceased to occupy the place of the suspended or expelled sovereignty of Spain, and has become an instrument of the new sovereignty. It has become the representative of sovereignty, instead of a substitute. Since hostilities have ceased in Porto Rico, it follows that the military government is not authorized to adopt measures seeking to promote the success of military operations, nor to justify its action on that ground.

"As to Porto Rico the war has ended, and the purposes of the military operations therein have been accomplished; that is to say, a complete conquest has been effected and a peace secured. Therefore in that island the United States is no longer a belligerent, and it follows that the existing government therein no longer exercises its powers by virtue of belligerent right."³²

"The conditions existing in Cuba differ materially from those prevailing in Porto Rico, as do also the powers of the military government.

"The sovereignty of Spain has been withdrawn from Cuba, but the sovereignty of the United States has not attached thereto, and the sovereignty, declared by Congress to be possessed by the people of the island, remains dormant. Under these conditions the military government of Cuba continues to be a substitute for sovereignty, as though the question of sovereignty were still pending the outcome of a war. It appears to the writer that under this condition the military government of Cuba may exercise such powers of sovereignty as are necessary for the successful conduct of the internal af-

³² Magoon, *Law of Civil Government under Military Occupation*, p. 19.

fairs of government, subject to the restraints imposed by the ideas and theories of government prevailing under the sovereignty by which it was created and the orders of the superior officials and authorities of the sovereignty by which said military government is sustained.”³³

Military control may be necessary in the time of an insurrection or other disturbance, when the ordinary operations of governmental organs are impossible.

“If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theater of active military operations, where war really prevails, there is necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and of society; and, as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war.”³⁴

³³ *Id.* p. 31.

³⁴ *Ex parte Milligan*, 4 Wall. 2, 18 L. Ed. 281.

CHAPTER XIX.

PRISONERS, DISABLED, AND SHIPWRECKED.

- 148. Prisoners of War.
- 149. Treatment of Prisoners of War.
- 150. Release of Prisoners.
- 151. Sick, Wounded, and Shipwrecked.

PRISONERS OF WAR.

- 148. Persons whom a belligerent may kill, capture, or deprive of liberty for military reasons are entitled to be treated as prisoners of war.**

In early times any inhabitant of a territory of the enemy might be made captive and be put to death. Gradually those of the inhabitants who from various reasons could not participate directly in the hostilities were made exempt. Toward the end of the fourteenth century publicists advocated a general recognition of exemption of children and old people. The stimulus to the capture of such persons was removed, so far as certain states were concerned, by agreements that such persons should not be the subject for ransom. To these exemptions on account of age, exemptions by reason of sex and of profession were added; and women, priests, and certain other persons engaged in professional work not related to the war were also included among those exempt from capture.¹

Lieber says in 1863:

"22. Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.

¹ Nys, *Les Origines du Droit International*, p. 237ff.

"23. Private citizens are no longer murdered, enslaved, or carried off to distant parts, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war.

"24. The almost universal rule in remote times was, and continues to be with barbarous armies, that the private individual of the hostile country is destined to suffer every privation of liberty and protection and every disruption of family ties. Protection was, and still is with uncivilized people, the exception.

"25. In modern regular wars of the Europeans, and their descendants in other portions of the globe, protection of the inoffensive citizen of the hostile country is the rule; privation and disturbance of private relations are the exceptions."²

Those liable to be made prisoners of war at the present time include (1) the regular armed forces of a belligerent, as members of the army and navy; (2) those who lawfully resist attack, as levies en masse; (3) those who are permitted to accompany the armed forces without forming a part of those forces, as newspaper correspondents, sutlers, contractors, etc.; (4) in exceptional cases persons who may be of special service to the enemy.³

TREATMENT OF PRISONERS OF WAR.

- 149. (1) Prisoners of war are in the power of the hostile government and entitled to humane treatment, which includes respect for person, private property not of a military character, and private rights, and reasonable maintenance in accordance with rank.**
- (2) They may be interned, may be given fit opportunity to engage in remunerative labor, or may be paroled.**
- (3) In order to secure the treatment accorded to prisoners of war, captured persons are under obligation to observe regulations, to give on request to the proper authority their true name and rank, and to observe the conditions of parole.**

² Appendix, arts. 22-25, p. 491.

³ Hague Convention, 1907, Laws and Customs of War on Land. Appendix, pp. 537-540.

- (4) Prisoners of war, if taken trying to escape, are liable to disciplinary punishment for attempting to escape; but if the attempt is successful, and they are subsequently recaptured, they are not to be punished for the previous act.**

In early warfare any inhabitant of an enemy territory might be made a captive, might be put to death, might be enslaved, or might be ransomed. Each of these methods of treatment marks a stage in the development of warfare. Captives, being an impediment in the movement of an army, unless kept for sake of ransom, were often slain. Captives in large numbers were put to death during the fifteenth century. The captives made by armies even up to the seventeenth century were liable to be sent into slavery. The captives were regarded as property of the persons capturing them, and so late as 1863 Dr. Lieber felt called upon to state: "A prisoner of war, being a public enemy, is the prisoner of the government, and not of the captor."⁴ It was not till about the time of Grotius that the more liberal treatment of prisoners of war became common. There had been from time to time, in very early days, limitations upon the exercise of capture in time of war. Even in the First and Second Punic Wars, exchange of prisoners and special consideration to certain private persons is recorded.⁵ Sallust denounces the putting to death of the inhabitants of a certain Numidian town by Marius as contrary to the rules of war.⁶ The fairness of treatment at one period might be followed by barbarities in the next, and these might extend to the entire population. In the mediæval period there was great difference in practice. Toward the end of the seventeenth century the subject of capture in war was considered by various publicists, and the principles were developed.

So late as 1785 the United States and Prussia provide by treaty "to prevent the destruction of prisoners of war." This treaty sets forth many principles which have subsequently been generally adopted.⁷

⁴ Appendix, art. 74, p. 498.

⁶ Jugurtha, c. 91.

⁵ Livy, XXII.

⁷ "And to prevent the destruction of prisoners of war, by sending them into distant and inclement countries, or by crowding them into

The Hague Convention of 1907 provides with fullness for the treatment of prisoners of war.⁸ It provides that prisoners of war shall be in the power of the government, that they shall be humanely treated, the standard of their maintenance

close and noxious places, the two contracting parties solemnly pledge themselves to each other and to the world that they will not adopt any such practice; that neither will send the prisoners whom they make take from the other into the East Indies, or any other parts of Asia or Africa, but that they shall be placed in some part of their dominions in Europe or America, in wholesome situations; that they shall not be confined in dungeons, prison ships, nor prisons, nor be put into irons, nor bound, nor otherwise restrained in the use of their limbs; that the officers shall be enlarged on their paroles within convenient districts, and have comfortable quarters, and the common men be disposed in cantonments open and extensive enough for air and exercise, and lodged in barracks as roomy and good as are provided by the party in whose power they are for their own troops; that the officers shall also be daily furnished by the party in whose power they are with as many rations, and of the same articles and quality as are allowed by them, either in kind or by commutation, to officers of equal rank in their own army; and all others shall be daily furnished by them with such ration as they allow to a common soldier in their own service; the value whereof shall be paid by the other party on a mutual adjustment of accounts for the subsistence of prisoners at the close of the war; and the said accounts shall not be mingled with, or set off against any others, nor the balances due on them be withheld as a satisfaction or reprisal for any other article or for any other cause, real or pretended, whatever; that each party shall be allowed to keep a commissary of prisoners of their own appointment, with every separate cantonment of prisoners in possession of the other, which commissary shall see the prisoners as often as he pleases, shall be allowed to receive and distribute whatever comforts may be sent to them by their friends, and shall be free to make his reports in open letters to those who employ him; but if any officer shall break his parole, or any other prisoner shall escape from the limits of his cantonment, after they shall have been designated to him, such individual officer or other prisoner shall forfeit so much of the benefit of this article as provides for his enlargement on parole or cantonment. And it is declared, that neither the pretence that war dissolves all treaties, nor any other whatever, shall be considered as annulling or suspending this and the next preceding article; but, on the contrary, that the state of war is precisely that for which they are provided, and during which they are to be as sacredly observed as the most acknowledged articles in the law of nature or nations." Article 24, Treaty of Sept. 10, 1785.

⁸ Laws and Customs of War on Land, c. 2, Appendix, p. 538.

being determined by that of similar troops in the captor's forces. They are to be allowed to work, to have so much freedom as consistent with military necessity. Provision is made for gathering and furnishing information in regard to those in captivity and for preserving their property and other legal rights and for parole.

By the Hague Convention of 1907 prisoners of war are liable to necessary discipline in order that rules and regulations may be observed. It recognizes that it is natural that a prisoner of war not under parole should attempt to escape and provides that,

"Escaped prisoners, who are retaken before being able to rejoin their own army, or before leaving the territory occupied by the army which captured them, are liable to disciplinary punishment.

"Prisoners who, after succeeding in escaping, are again taken prisoners, are not liable to any punishment on account of the previous flight." *

RELEASE OF PRISONERS.

150. Prisoners may be released conditionally or fully.

- (a) **Prisoners may be released conditionally on parole, a verbal agreement, entered into by an individual of the enemy for himself, by which he pledges his honor that he will do or refrain from doing certain things in consideration of certain privileges or advantages. An officer may sometimes make such an agreement in behalf of his command.**
- (b) **Prisoners of war are sometimes fully released on payment of ransom, in compensation for their discharge from custody.**
- (c) **Or prisoners may be fully released by exchange, which consists in the mutual turning over by each government of a certain number of prisoners in accord with a special agreement, called a "cartel."**
- (d) **Prisoners are at liberty when coming upon neutral soil, and when brought into neutral waters on a ship taken as prize, unless under stress.**

* Laws and Customs of War on Land, art. VIII, Appendix, p. 539.

- (e) Prisoners are also at liberty on coming within the territory of their own state, if not under parole or other obligation.
- (f) Prisoners are generally released under specific agreement at the close of war.

(a) "Prisoners of war may be set at liberty on parole if the laws of their country allow, and, in such cases, they are bound, on their personal honor, scrupulously to fulfill, both towards their own government and the government by whom they were made prisoners, the engagements they have contracted.

"In such cases their own government is bound neither to require of nor accept from them any service incompatible with the parole given.

"A prisoner of war cannot be compelled to accept his liberty on parole. Similarly the hostile government is not obliged to accede to the request of the prisoner to be set at liberty on parole.

"Prisoners of war, liberated on parole and recaptured bearing arms against the government to whom they had pledged their honor, or against the allies of that government, forfeit their right to be treated as prisoners of war, and can be brought before the courts."¹⁰

A neutral power, which has interned within its territory troops belonging to the belligerent armies, may decide whether officers may be allowed liberty on their parole not to leave neutral territory without permission.¹¹

(b) The release of prisoners of war on payment of ransom was quite common during the Middle Ages, but is now practically obsolete, although, in the instructions for the government of the armies of the United States in the field provision is made as follows: "The surplus number of prisoners of war remaining after an exchange has taken place is sometimes released, either for the payment of a stipulated sum of money,

¹⁰ Id. arts. X-XII, Appendix, p. 539. For full treatment, see, also, Ariga, *La Guerre Russo-Japonaise*, 114. Takahashi, *Int. Law applied to Russo-Japanese War*, 107-147.

¹¹ Rights and Duties of Neutral Powers, art. XI, Appendix, p. 547.

or, in urgent cases, of provision, clothing, or other necessities. Such arrangement, however, requires the sanction of the highest authority."¹²

(c) No belligerent is compelled to exchange prisoners of war. Each has a perfect right to keep all prisoners of war until the close of hostilities. Agreements to exchange are based purely upon mutual convenience. If entered into, the cartel sets forth all of the terms of the agreement as to time, place, and method to be pursued. These agreements are strictly construed, violation of the terms by one party releases the other party from obligation, and the basis of exchange is clearly set forth. Strict equivalents must be given, such as private for private, rank for rank, etc. If, after all of the prisoners have been exchanged upon the agreed basis, there is a surplus, credit may be given or payment made for this surplus. Prisoners who have been exchanged, like those who have escaped from confinement, are restored to their belligerent rights.¹³

(d) The belligerent is responsible for guarding prisoners of war. The retention of a portion of the enemy's forces is an incident of the war. These prisoners may be released by capture by the forces of the state to which they belong. Such action is not lawful upon neutral land area. If belligerents were allowed to bring upon neutral land and retain prisoners of war, such prisoners would be placed beyond the possibility of release by the forces to which they belonged, and would be even more secure for the captor than in his own territory. Such a result would not be reasonable, nor in accord with neutrality, and prisoners coming on neutral territory are, ipso facto, at liberty. Similarly, if prisoners of war are not effectively guarded, and consequently escape to neutral territory, they are free. The Hague Convention of 1907 says:

"A neutral power which receives escaped prisoners of war shall leave them at liberty. If it allows them to remain in its territory, it may assign them a place of residence.

¹² General Order 100, U. S. Army, April 24, 1863, art. 108, Appendix, p. 502; 2 Halleck, Int. Law, 364.

¹³ Id. § 7, Appendix, p. 503.

"The same rule applies to prisoners of war brought by troops taking refuge in the territory of a neutral power."¹⁴

There has been great variation of practice in the treatment of captured vessels brought into neutral ports; but the general trend in recent years, as shown in neutrality proclamations and practice, is toward a strict regulation of the entrance of vessels with prize, and in most instances states have prohibited entrance except in case of stress. The Hague Convention of 1907 enumerates the rule that:

"A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions.

"It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral power must order it to leave at once; should it fail to obey, the neutral power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew."

This provision is somewhat modified by the provision in regard to sequestration, which has not been accepted by the United States and some of the other powers.¹⁵

(e) As captivity continues only during effective holding, a prisoner of war is usually at liberty on entering the jurisdiction of his own state, or coming within the area of military occupation of his own forces. The prisoner on parole is still regarded as under the control of the state which made him a prisoner, for he is not under obligation to accept liberty on parole, but is under observation to observe it when once accepted, and his state should neither "require of nor accept from him any service" incompatible with the parole given.¹⁶

(f) The Hague Convention of 1907 provides that, "after the conclusion of peace, the repatriation of prisoners of war shall be carried out as quickly as possible."¹⁷

¹⁴ Rights and Duties of Neutral Powers, art. XIII, Appendix, p. 547.

¹⁵ Rights and Duties of Neutral Powers in Naval War, arts. XXI-XXIII, Appendix, p. 566.

¹⁶ Laws and Customs of War on Land, art. X, Appendix, p. 539.

¹⁷ Id. art. XX.

The treaty of peace between Spain and the United States in 1898 even provided in article V that:

"The United States will, upon the signature of the present treaty, send back to Spain, at its own cost, the Spanish soldiers taken as prisoners of war on the capture of Manila by the American forces. The arms of the soldiers in question shall be restored to them.

"Spain will, upon the exchange of the ratifications of the present treaty, proceed to evacuate the Philippines, as well as the island of Guam, on terms similar to those agreed upon by the commissioners appointed to arrange for the evacuation of Porto Rico and other islands in the West Indies, under the protocol of August 12, 1898, which is to continue in force till its provisions are completely executed.

"The time within which the evacuation of the Philippine Islands and Guam shall be completed shall be fixed by the two governments. Stands of colors, uncaptured war vessels, small arms, guns of all calibers, with their carriages and accessories, powder, ammunition, live stock, and materials and supplies of all kinds, belonging to the land and naval forces of Spain in the Philippines and Guam, remain the property of Spain. Pieces of heavy ordinance, exclusive of field artillery, in the fortifications and coast defenses, shall remain in their emplacements for the term of six months, to be reckoned from the exchange of ratifications of the treaty; and the United States may, in the meantime, purchase such material from Spain, if a satisfactory agreement between the two governments on the subject shall be reached.

"Article VI. Spain will, upon the signature of the present treaty, release all prisoners of war, and all persons detained or imprisoned for political offenses, in connection with the insurrections in Cuba and the Philippines and the war with the United States.

"Reciprocally, the United States will release all persons made prisoners of war by the American forces, and will undertake to obtain the release of all Spanish prisoners in the hands of the insurgents in Cuba and the Philippines.

"The government of the United States will at its own cost return to Spain, and the government of Spain will at its own

cost return to the United States, Cuba, Porto Rico, and the Philippines, according to the situation of their respective homes, prisoners released or caused to be released by them, respectively, under this article."

SICK, WOUNDED, AND SHIPWRECKED.

151. There are special regulations for the care of the sick and wounded of armies, and of the sick, wounded, and shipwrecked of naval forces in time of war.

Persons whose business was to care for the sick and wounded seem to have been attached to some armies during the sixteenth century, and the practice became more and more common from that time. Such persons were at first exempt, because noncombatants, and in order that their army might be in better condition were to give attention, particularly to their own forces. It was not till the latter half of the eighteenth century that the idea of humanity, based on the liberal theories of the period, led to the doctrine that there should be no distinction in the treatment of wounded in battle.¹⁸ At about the same time immunities began to be generally extended to military hospitals, and the wounded and sick were not regarded as prisoners of war. The wars of the first sixty years of the nineteenth century showed great diversity in practice in treatment of the question. Some of these wars, particularly the Crimean War, from 1854 to 1856, showed the need of established rules. During the American Civil War regulations were adopted by the United States as follows:

"53. The enemy's chaplains, officers of the medical staff, apothecaries, hospital nurses, and servants, if they fall into the hands of the American army, are not prisoners of war, unless the commander has reasons to retain them. In this latter case, or if, at their own desire, they are allowed to remain with their captured companions, they are treated as prisoners of war, and may be exchanged if the commander sees fit."

"79. Every captured wounded enemy shall be medically treated, according to the ability of the medical staff."

¹⁸ Bogalewsky, *Les Secours aux Militaires Malades et Blessés avant le XIX^e Siècle*, 10 R. G. D. I. P. p. 217.

"115. It is customary to designate by certain flags (usually yellow) the hospitals in places which are shelled, so that the besieging enemy may avoid firing on them. The same has been done in battles, when hospitals are situated within the field of the engagement.

"116. Honorable belligerents often request that the hospitals within the territory of the enemy may be designated, so that they may be spared.

"An honorable belligerent allows himself to be guided by flags or signals of protection as much as the contingencies and the necessities of the fight will permit."¹⁹

Largely through the efforts of Gustave Moynier²⁰ and Jean Henri Dunant²¹ of Switzerland, representatives of twelve states gathered on the invitation of the Swiss government and formulated the Geneva Convention for the Amelioration of the Condition of Soldiers Wounded in Armies in the Field, 1864. This convention formulated the best ideas of the time. From the provision that the hospital flag should "bear a red cross on a white ground" the reverse of the Swiss flag, the convention was frequently called the Red Cross Convention. At another conference, held at Geneva in 1868, fifteen further articles were adopted, five being in amplification of the convention of 1864, and the remaining articles with view to adaptation of the provisions to naval warfare. These last articles were embodied in The Hague Convention of 1899 for the Adaptation of the Principles of the Geneva Convention of 1864 to Maritime Warfare. A new convention was concluded at Geneva in 1906 which, while embodying the principles of the convention of 1864, brought its provisions more nearly into accord with present conditions. The delegates of thirty-five powers signed the convention of 1906.²²

The adoption of this convention of 1906 made it necessary to revise the convention of 1899, and at the Hague Conference

¹⁹ Appendix, pp. 496, 498, 502, 503.

²⁰ Moynier, in recognition of his humanitarian services, was made honorary president of the Geneva Convention of 1906.

²¹ Dunant was in 1901 awarded the Nobel prize for his efforts to mitigate the severity of war. Dunant's book, *Le Souvenir de Solferino*, 1862, called attention to the sufferings in modern warfare.

²² The Geneva Convention of 1906, Appendix, p. 508.

of 1907, a Convention for the Adaptation of the Principles of the Geneva Convention of 1906 was concluded. The fourteen articles of the convention of 1899 were extended to twenty-eight and considerably elaborated.

The convention of 1906 provides for the care of the sick and wounded of an army, for the sanitary formations and establishments, for the personnel and matériel, and for a distinctive emblem, the Red Cross.

The convention of 1907, adapting the convention of 1906 to naval warfare, specifies how the status of hospital ships shall be made known in order that they may be exempt, how they shall be painted in order to be easily distinguished, what other means shall be taken to make themselves known, and for the degree of control to be exercised over hospital ships by belligerents, the degree of immunity which shall be accorded to them, and their obligations and duties. No distinction is to be made in the treatment of the sick or wounded of different belligerents.

"The shipwrecked, wounded, or sick of one belligerent who fall into the power of the other belligerent are prisoners of war."

"Art. 12. Any ship of war belonging to a belligerent may demand the surrender of the wounded, sick, or shipwrecked who are on board military hospital ships, hospital ships belonging to relief societies or to private individuals, merchant ships, yachts, and boats, whatever the nationality of such vessels.

"Art. 13. If wounded, sick, or shipwrecked persons are taken on board a neutral war ship, precaution must be taken, so far as possible, that they do not again take part in the operations of the war."²³

After an engagement the belligerents are also to take such measures as possible to recover and protect those shipwrecked, wounded, or sick, and are to inform each other so far as possible in regard to admissions to hospitals, deaths, etc.

Article 12 would apply to the questions raised in the case of the *Deerhound*, a neutral yacht which took on board and

²³ The Convention for Adaptation of the Principles of the Geneva Convention to Maritime Warfare, Appendix, p. 549.

declined to deliver to the United States commander the captain and some of the crew of the Confederate cruiser *Alabama*, on June 19, 1864, after her defeat. This article seems reasonable, as such ships as the *Deerhound* are not to harbor those who may, if not received on board neutral vessels, be made prisoners of war.

Article 13 would be analogous to the entrance of belligerent troops upon neutral land area, and would imply that they should be practically interned. This is in accord with the action in the *Chemulpo* affair in 1904, when, after the defeat of certain Russian vessels by the Japanese, neutral war vessels took on board wounded, sick, and shipwrecked Russians, and sent them to neutral ports under parole that they would not again take part in the war.²⁴

²⁴ Takahashi, *Russo-Japanese War*, p. 462.

CHAPTER XX.

NON-HOSTILE RELATIONS BETWEEN BELLIGERENTS.

- 152. Non-Hostile Relations between Belligerent Forces.
- 153. Flags of Truce.
- 154. Capitulations.
- 155. Armistices.
- 156. Operation of Armistices.
- 157. Cartels.
- 158. Safe-conducts and Passports.
- 159. Safeguards.
- 160. Licenses to Trade.

NON-HOSTILE RELATIONS BETWEEN BELLIGERENT FORCES.

- 152. Under the term "commercia belli" is included certain non-hostile relations into which belligerents enter during war.**

Non-hostile relations between belligerents during the war are in general suspended. It is necessary, however, for special purposes that certain relations be established. These relations may refer to the conduct or cessation of hostilities. These relations are based upon good faith. Under the term "commercia belli" are usually included flags of truce, capitulations, armistices, cartels, safe-conducts and passports, safeguards, and licenses to trade.

FLAGS OF TRUCE.

- 153. Flags of truce are white flags, used as signals to indicate that a belligerent wishes to communicate with the enemy.**

The person bearing a flag of truce, together with the bugler or drummer, and the interpreter who may accompany him, are considered as inviolate, though he may not be received, or may be prevented from taking any advantage of his position; e. g., he may be blindfolded. He is not regarded as a spy if he discloses such information as he obtains openly. He loses his

privileged position if he provokes or commits an act of treachery. The flag of truce will not protect him, under such circumstances, from seizure and execution.¹ There is no obligation upon the part of the belligerent to receive the bearer of a flag of truce, and after the bearer has been warned and given time to withdraw he acts at his own risk. The bearer of a flag of truce must be authorized to enter into communication with the belligerent, which implies that the flag must be used for legitimate purposes, for the bearer may be detained in case of abuse of the privilege. Military operations are not necessarily suspended because of the approach of a bearer of a flag of truce, if he has been warned that he will not be received. Such warning is usually given by signal. A belligerent may specify a period during which no flag of truce will be received, and during that period bearers of flags of truce have no privileges.

In maritime warfare the conditions are such that the cessation of hostilities on the approach of the bearer of a flag of truce might materially change the issue of the battle. As the commanding officer is responsible, it is for him to determine whether the bearer of the flag of truce shall be met. The approach of such a flag should therefore be made known to him. A shot across the bows of the boat bearing the flag of truce is a signal not to come nearer. If the flag is to be received, a boat flying a white flag with an authorized officer will meet the enemy's representative.

CAPITULATIONS.

154. Capitulations are agreements entered into between commanding officers in regard to the surrender of a vessel, a place, or military forces.

In entering into a capitulation, a commander should act within his competence. The effect of such an agreement should

¹ Hague Convention 1907, Laws and Customs of War on Land, c. III, Appendix, p. 542.

The Japanese in 1904 claimed that their fire upon troops bearing a white flag was because the flag was used in a treacherous manner. Arigs, *La Guerre Russo-Japonaise*, p. 250.

be military, and not political. If an agreement is in excess of the commander's authority, it must receive subsequent ratification by the proper authority. The Hague Convention of 1907 provides:

"Article XXXV. Capitulations agreed upon between the contracting parties must take into account the rules of military honor.

"Once settled, they must be scrupulously observed by both parties."²

The two main clauses of the terms of capitulation of Port Arthur on January 2, 1905, were:

"Art. I. The military and naval forces of Russia in the fortress and harbor of Port Arthur, as well as the volunteers and the officials, shall all become prisoners.

"Art. II. The forts and fortifications of Port Arthur, the warships and other craft, including torpedo craft, the arms, the ammunition, the horses, all and every material for warlike use, shall be handed over as they are to the Japanese army."

Other clauses provide for the carrying out of the surrender, the treatment of the combatants and noncombatants, and minor details. In article VII it was specially provided that "the Japanese army, as an honor to the brave defense made by the Russian army, will allow the officers of the Russian military and naval forces and the officials attached to the said forces to retain their swords, together with all privately owned articles directly necessary for daily existence. Further, with regard to the said officers, officials, and volunteers, such of them as solemnly pledge themselves in writing not to bear arms again until the close of the present war, and not to perform any act of whatsoever kind detrimental to the interests of Japan, shall be permitted to return to their country, and one soldier shall be allowed to accompany each officer of the army or navy. These soldiers shall be required to give a similar pledge."³

² Laws and Customs of War on Land, c. IV, Appendix, p. 542.

³ Takahashi, Russo-Japanese War, pp. 211, 212.

ARMISTICES.

155. An armistice is a suspension of military operations by agreement between the belligerents.

Armistices may be:

- (a) Definite or indefinite.**
- (b) General or local.**

(a) A definite armistice prescribes the time at which it will become operative and its duration. An indefinite armistice makes it possible for a belligerent to resume hostilities at any time, subject to the conditions agreed upon in the terms.

(b) A general armistice suspends all military operations between the belligerents. A local armistice suspends hostilities within a given area or between specified forces.⁴

The terms "suspension of arms" and "truce" are also used to describe such agreements.

The armistice signed by the Russian and Japanese plenipotentiaries preliminary to the coming into operation of the Treaty of Portsmouth in 1905 was as follows:

"1. A certain distance (zone of demarcation) shall be fixed between the fronts of the armies of the two powers in Manchuria, as well as in the region of the Tomanko.

"2. The naval forces of one of the belligerents shall not bombard territory belonging to or occupied by the other.

"3. Maritime captures will not be suspended by the armistice.

"4. During the term of the armistice reinforcements shall not be dispatched to the theater of war. Those which are en route shall not be dispatched to the north of Moukden on the part of Japan and to the south of Harbin on the part of Russia.

"5. The commanders of the armies and fleets of the two powers shall determine on common accord the conditions of the armistice in conformity with the provisions above enumerated.

"6. The two governments shall give orders to their commanders immediately after the signature of the Treaty of Peace in order to put this protocol into execution."⁵

⁴ Laws and Customs of War on Land, c. V, Appendix, p. 542.

⁵ Takahashi, Russo-Japanese War, p. 219.

OPERATION OF ARMISTICES.

156. The suspension of hostilities commences on notification of the existence of the armistice, or at the time fixed in the agreement, and continues in accord with its terms for the time specified, unless denounced for good cause.

In case of an armistice or truce, hostilities are suspended immediately on notification, or at a fixed time.

When the armistice or truce is general, and extends over a large area of hostile operations, the custom is to fix different dates for the different localities, so as to permit time for receipt of the news at these places.

A subordinate officer is bound only in case of notification from a superior authority, not by a statement of the enemy.

In the protocol of August 12, 1898, preliminary to the treaty of peace between the United States and Spain, it was stipulated that:

"Article VI. Upon the conclusion and signing of this protocol, hostilities between the two countries shall be suspended, and notice to that effect shall be given as soon as possible by each government to the commanders of its military and naval forces."

In a proclamation of President McKinley of the same date he said:

"Whereas, it is in said protocol agreed that upon its conclusion and signature hostilities between the two countries shall be suspended, and that notice to that effect shall be given as soon as possible by each government to the commanders of its military and naval forces:

"Now, therefore, I, William McKinley, President of the United States, do, in accordance with the stipulations of the protocol, declare and proclaim on the part of the United States a suspension of hostilities, and do hereby command that orders be immediately given through the proper channels to the commanders of the military and naval forces of the United States to abstain from all acts inconsistent with this proclamation." ⁶

⁶ 30 Stat. 1780.

The usual effect of an armistice or truce is to suspend all hostile operations of an active nature, with the implied understanding that conditions shall remain as at the commencement of the armistice, and all acts during the armistice tending to strengthen a belligerent, which his enemy would be in a position to prevent, were it not for the truce, are prohibited. Operations which could be carried on irrespective of the armistice, in general, are permissible.

"It rests with the contracting parties to settle, in the terms of the armistice, what communications may be held in the theater of war with the inhabitants, and between the inhabitants of one belligerent state and those of the other.

"Any serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately.

"A violation of the terms of the armistice by private persons acting on their own initiative only entitles the injured party to demand the punishment of the offenders, or, if necessary, compensation for the losses sustained."⁷

In case an armistice is not denounced, and there is no time specified for its termination, hostilities may be resumed after warning agreed upon between the belligerents. If a time for its termination is fixed in the agreement, hostilities may be resumed after that time.

CARTELS.

157. Cartels are agreements between belligerents for the purpose of regulating permitted intercourse in time of war, particularly the exchange and treatment of prisoners.

Conventional agreements of the nature of cartels seem to have been in use as early as the middle of the sixteenth century and to have been in common use during the Thirty Years War, 1618-1648. These agreements sometimes fixed the ratio of exchange of prisoners and the amount of money to be paid for each prisoner in excess of the even exchange number. In

⁷ Laws and Customs of War on Land, arts. XXXIX-XLI, Appendix, p. 543.

a treaty between the United States and Prussia in 1785, very liberal rules for the treatment, care, and parole of prisoners of war were made. In many respects the most advanced regulations of the present day are not more humane. There is a provision "that each party shall be allowed to keep a commissary of prisoners of their own appointment, with every separate cantonment of prisoners in possession of the other, which commissary shall see the prisoners as often as he pleases, shall be allowed to receive and distribute whatever comforts may be sent to them by their friends, and shall be free to make his reports in open letters to those who employ him." That this and other similarly enlightened provisions might not fail, the treaty further specifies in article 24: "And it is declared that neither the pretense that war dissolves all treaties, nor any other whatever, shall be considered as annulling or suspending this and the next preceding article; but, on the contrary, that the state of war is precisely that for which they are provided, and during which they are to be as sacredly observed as the most acknowledged articles in the law of nature or nations."

Both belligerents are bound to observe the terms of the cartel, and they "are of such force under the law of nations that even the sovereign cannot annul them."⁸

In case vessels are concerned in the performance of a cartel contract, such vessels are exempt from capture and entitled to protection of both belligerents so long as strictly engaged in the exchange. Any departure from the strict line of service under the engagement may make the vessel liable under the ordinary laws of war. Such vessels are not to be armed or prepared for carrying on hostilities, though they may carry a gun for saluting purposes.

⁸ United States v. Wright, 28 Fed. Cas. 796.

SAFE-CONDUCTS AND PASSPORTS.

158. A safe-conduct is a form of pass issued by a commanding officer in a region, authorizing an enemy subject to travel under specified conditions as to time and place in that region.

Safe-conducts are also issued to permit the carriage of goods to a specified place.

General permission to travel in the area belonging to or occupied by a belligerent is sometimes issued by the government in the form of a passport.

The safe-conduct is issued by the commanding officer in the region. The passport is granted by the government. They are alike not transferable, and liable to be withdrawn if not properly used or for military reasons.

SAFEGUARDS.

159. A safeguard is a protection granted either to persons or property within the limits of the command, and consists either in a written order or a guard of soldiers.

When a safeguard is in the form of a written order, it may be given to the enemy subject or may be posted upon the property. Property thus protected usually is semi-public in character, as museums, libraries, etc. Safeguard in the form of a detail of one or more soldiers may also be given. In such case this guard is inviolable, and if they fall into the power of the enemy must be treated with consideration and be sent back to their command.

The term "safeguard," or "safe-conduct," is sometimes used to describe the copy of a ransom bill retained by the master of a vessel who has purchased his release from capture, as this serves to protect him from capture by vessels of the belligerent from which he has purchased his release, provided he observes the conditions under which he has been released.

LICENSES TO TRADE.

160. Licenses to trade are written permissions, authorizing a person in time of war to carry on trade with a particular place or in specified articles.

The arrangements in regard to licenses to trade, as of safe-conducts and passports, are, in general, matters of municipal rather than international law; but, like cartels, their provisions must be strictly observed in order to retain the privileges which they confer, though failure to observe the terms of the license in consequence of stress of weather or other necessity will receive consideration.⁹ The sailing under the license of an enemy may subject a vessel to capture and condemnation by its own state.¹⁰

During the Spanish-American War in 1898 the counsel of the Equitable Life Assurance Society of the United States desired of the State Department authority to apply to the Spanish government for "a license that will enable it to protect its real estate and other assets in Spain." In reply Mr. Moore said:

"In this relation, the Department desires to refer to article XIII of the treaty between the United States and Spain, concluded at San Lorenzo el Real, October 22, 1795.

"The provisions of the article are as follows:

"For the better promoting of commerce on both sides, it is agreed that, if a war shall break out between the said two nations, one year after the proclamation of the war shall be allowed to the merchants in the cities and towns where they shall live for collecting and transporting their goods and merchandises; and if anything be taken from them, or any injury be done them, within that term, by either party, or the people or subjects of either, full satisfaction shall be made for the same by the government.'"¹¹

⁹ *The Sea Lion*, 5 Wall. 630, 18 L. Ed. 618; *Coppell v. Hall*, 7 Wall. 542, 19 L. Ed. 244; *Siffkin v. Glover*, 4 Taunt. 717.

¹⁰ *The Hiram*, 8 Cranch, 444, 3 L. Ed. 619; *The Aurora*, 8 Cranch, 203, 3 L. Ed. 536; *The Julia*, 8 Cranch, 181, 3 L. Ed. 528; *The Caledonian*, 4 Wheat. 100, 4 L. Ed. 523.

For further cases, see footnotes 2 Halleck, *Int. Law* (4th Ed.) 381-388.

¹¹ 7 Moore, 255.

CHAPTER XXI.

TERMINATION OF WAR.

- 161. Methods of Termination.
- 162. Conquest.
- 163. Effect of Conquest.
- 164. Cessation of Hostilities.
- 165. Effect of Cessation of Hostilities.
- 166. Treaty of Peace.
- 167. Scope of a Treaty of Peace.
- 168. Effect of a Treaty of Peace.
- 169. Proclamation.
- 170. Postliminium.
- 171. Amnesty.

METHODS OF TERMINATION.

161. War may be terminated:

- (a) By conquest.
- (b) By cessation of hostilities.
- (c) By a treaty of peace.
- (d) In case of a civil war, by proclamation.

CONQUEST.

162. When war is terminated by conquest, there may be involved the complete submission of one belligerent to the other.

The complete submission of one belligerent to the other was in early times regarded as the natural consequence of war. The Roman idea of *debellatio* involved the submission of the enemy. Gradually there has grown up a distinction between conquest and military occupation. Military occupation may be simply an incident of the conduct of military operations, or merely an attempt to put pressure upon the enemy for the purpose of hastening the end of the war, but with no purpose of obtaining dominion over the territory. Halleck says: "By the term 'conquest' we understand the forcible ac-

quisition of territory admitted to belong to the enemy. It expresses, not a right, but a fact, from which rights are derived. Until the fact of conquest occurs, there can be no rights of conquest."¹

If actual possession is practically undisputed for a considerable time, is generally recognized by other states, or is of such a nature as to manifest on the part of the conqueror an ability to hold and on the part of the conquered complete submission, it is enough.

There must be ability and evident disposition on the part of the conqueror to retain his conquest.

The actual possession for a considerable time is not conclusive evidence of conquest, for this may merely constitute military occupation. The possession accompanied by a disposition to submit is strong evidence of valid conquest. If the conquest is generally recognized by other states, there is presumption that it is valid. When, however, the conqueror receives the unconditional surrender of the other belligerent, the war is at an end. The enemy is considered conquered when he submits to the will of his opponent. It is not necessary that he should have no further resources or ability to continue the contest. It is of importance to know when belligerent relations are succeeded by peaceful relations, for the status of other than the belligerent parties is affected in many ways. In modern times it has not been common to allow the uncertainty as to the termination of the war to continue, and the successful belligerent is usually in position to determine when the war shall be declared at an end, or shall be ended by agreement.

Lawrence briefly says of conquest: "This is the retention of territory taken from an enemy in war, and the exercise therein of all the powers of sovereignty, with the intention of continuing to do so permanently, which intention is usually set forth in a proclamation or some other legal document. Good examples are to be found in the annexations of the Transvaal and the Orange Free State by Great Britain in 1900. Conquest in the jural sense differs from cession by forced gift, in that there is no formal international transaction which marks

¹ 2 Halleck, *Int. Law* (4th Ed.) p. 491.

the exact time of the commencement of the new title, and from conquest in the military sense, in that it involves permanent rule over the territory. When a conquest in the military sense of part of a state's territory is confirmed by treaty of peace, the title to the conquered part is one of cession, not of conquest in the legal sense."²

At the International American Conference of sixteen American states in 1889-90, a resolution was adopted on April 18, 1890, with only one abstention as follows:

"Resolved, by the International American Conference, that it earnestly recommends to the governments therein represented the adoption of the following declarations:

"First. That the principle of conquest shall not, during the continuance of the treaty of arbitration, be recognized as admissible under American public law.

"Second. That all cessions of territory made during the continuance of the treaty of arbitration shall be void, if made under threats of war or in the presence of an armed force.

"Third. Any nation from which such cessions shall be exacted may demand that the validity of the cessions so made shall be submitted to arbitration.

"Fourth. Any renunciation of the right to arbitration, made under the conditions named in the second section, shall be null and void."³

THE EFFECT OF CONQUEST.

163. The effects of conquest are, in general:

- (a) To transfer to the conqueror the rights and obligations that belonged to the conquered territory.
- (b) To render valid acts of the conqueror from the date of military occupation of the territory.

Grotius says that "it is not customary to take landed property, except under public authority, after an army has been brought in and strongholds have been established."⁴

The continental doctrine has been that possession by force

² Handbook of Public International Law (7th Ed.) p. 53.

³ 2 Reports of Committees and Discussions Thereon, Int. American Conference, p. 1147.

⁴ Grotius, *De Jure Belli ac Pacis*, lib. III, 11.

was simply a fact, which would be confirmed as a right only by a tacit or explicit abandonment by the former sovereign, or by the complete subjugation of that sovereign.

Great Britain has regarded an enemy territory which is effectively occupied as ipso facto British territory. The United States has followed the British doctrine. In Magoon's Reports in 1902 it is said: "When Spain elected to go to war rather than withdraw from Cuba, she subjected the sovereignty and dominion of her entire realm to the hazard of that war, and by the laws of war and of nations she made it lawful for her adversary to invade any part of her domain and displace her sovereignty, exclude her jurisdiction, and destroy her dominion; in others words, effect a complete conquest. So much of her domain as became so situated was without the jurisdiction of Spain and within the possession of the United States. As to the United States, such territory was the same as land newly discovered and occupied by citizens of the United States, with this difference: The occupier was a military force of the United States sent there by the nation itself, instead of a private citizen and pioneer adventurer."⁵

If the whole state is completely conquered, there is no authority with which to make any treaty, and the rights and obligations belonging to the territory pass to the conqueror. The conquering state would not necessarily obtain the rights belonging to the sovereign of the conquered in his relations to other states, nor assume his obligations; e. g., rights and duties based on alliances. The rights and duties based on internal sovereignty would in general pass to the conqueror. The conqueror would be under no obligation to give to the inhabitants of the conquered territory rights which were not extended to his own citizens, and he might even restrict the rights of, and impose additional burdens upon, the inhabitants of the conquered territory. "Their condition should remain as eligible as is compatible with the objects of the conquest."⁶

⁵ Magoon, *The Law of Civil Government under Military Occupation*, p. 51.

⁶ "Conquest gives a title, which the courts of the conqueror cannot deny, whatever may be the speculative opinions of individuals respecting the original justice of the claim, which has been success-

If a portion of a state is acquired by conquest, the basis of acquisition is usually fixed by treaty; if not thus determined, the public property and general rights of territorial jurisdiction pass to the conqueror. The nonpolitical rights of the inhabitants remain, unless changed by the conqueror.⁷ In the case of Count Platen Halletmund, who was tried by the courts of Prussia in 1866 for treason, the opinion was given that the mere forcible conquest of a country did not, of itself, create the relation of sovereign and subject between the conqueror and the conquered; that in order to create such a relation there must be an express or tacit submission to the new government.⁸ This might be by formal action or by simple retention of domicile in the conquered territory.

The jurisdiction of a state is suspended in the territory occupied by an enemy. Acts done during the period of military occupancy rest for their authority upon the occupant. In case the occupancy is converted into complete dominion through conquest, the authority of the conquered state is regarded as at an end from the date of effective occupancy by the con-

fully asserted. But, although this title is acquired and maintained by force, humanity, acting on public opinion, has prescribed rules and limits by which it may be governed. Thus it is a rule that the captured shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest. Most usually they are incorporated with the victorious nation, and become subjects or citizens of the government with which they are connected. The new and old members of the society mingle with each other, the distinction between them is gradually lost, and they become one people. Where this incorporation is practicable, humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired, that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of their being separated from their ancient connections and united by force to strangers. When the conquest is complete, and the conquered inhabitants can be blended with the conquerors, or safely governed as a distinct people, public opinion, which not even the conqueror can disregard, imposes those restraints upon him, and he cannot neglect them without injury to his name and hazard of his power." *Johnson v. McIntosh*, 8 Wheat. 543, 5 L. Ed. 681.

⁷ *United States v. Moreno*, 1 Wall. 400, 17 L. Ed. 633.

⁸ 1 Halleck, *Int. Law* (4th Ed.) 510.

queror, and acts subsequent to that time derive validity from his sanction. In 1833, in the case of *United States v. Percheman*, Mr. Chief Justice Marshall said:

"It may not be unworthy of remark that it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated, that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed."⁹

Later the United States court said in regard to the effect of conquest on property rights:

"By the law of nations, the inhabitants, citizens, or subjects of a conquered or ceded country, territory, or province retain all the rights of property which have not been taken from them by the orders of the conqueror, or the laws of the sovereign who acquired it by cession, and remain under their former laws until they shall be changed."¹⁰

In the case of *United States et al. v. Huckabee* the Supreme Court set forth quite fully the attitude of the United States:

"All captures in war vest primarily in the sovereign; but in respect to real property Chancellor Kent says the acquisition by the conqueror is not fully consummated until confirmed by a treaty of peace or by the entire submission or destruction of the state to which it belonged, which latter rule controls the question in the case before the court, as, the confederation having been utterly destroyed, no treaty of peace was or could be made, as a treaty requires at least two contracting parties. Power to acquire territory, either by conquest or treaty, is vested by the Constitution in the United States. Conquered territory, however, is usually held as a mere military occupation until the fate of the nation from which it is conquered is determined; but if the nation is entirely subdued,

⁹ 7 Pet. 51, 8 L. Ed. 604.

¹⁰ *Mitchell v. United States*, 9 Pet. 715, 9 L. Ed. 283.

or in case it be destroyed and ceases to exist, the right of occupation becomes permanent and the title vests absolutely in the conqueror. Complete conquest, by whatever mode it may be perfected, carries with it all the rights of the former government; or, in other words, the conqueror, by the completion of his conquest, becomes the absolute owner of the property conquered from the enemy nation or state. His rights are no longer limited to mere occupation of what he has taken into his actual possession, but they extend to all the property and rights of the conquered state, including even debts as well as personal and real property."¹¹

Hall summarizes the effects of conquest by saying:

"The effects of conquest are:

"1. To validate acts done in excess of the rights of a military occupant between the time that the intention to conquer has been signified and that at which conquest is proved to be completed.

"2. To confer upon the conquering state property in the conquered territory, and to invest it with the rights and affect it with the obligations which have been mentioned as accompanying a territory upon its absorption into a foreign state.

"3. To invest the conquering state with sovereignty over all subjects of a wholly conquered state, and over such subjects of a partially conquered state as are identified with the conquered territory at the time when the conquest is definitively effected, so that they become subjects of the state and are naturalized for external purposes, without necessarily acquiring the full status of subject or citizen for internal purposes. The persons who are so identified with conquered territory that their nationality is changed by the fact of conquest are, of course, mainly those who are native of and established upon it at the moment of conquest. To these must be added persons native of another part of the dismembered state, who are established on the conquered territory and continue their residence there. Correlatively persons native of the conquered territory, but established in another part of the state to which it formerly belonged, ought to be considered to be subjects of the latter."¹²

¹¹ 16 Wall. 414, 21 L. Ed. 457.

¹² Hall, *Int. Law* (5th Ed.) p. 570.

CESSATION OF HOSTILITIES.**164. Certain wars have come to an end by the simple cessation of hostilities.**

When war comes to an end by a simple cessation of hostilities, not only the subjects of the belligerent states, but also those of neutral states, are in doubt as to the extent of their rights and their status. Instances of this mode of terminating a war occurred in 1716, when Sweden and Poland were engaged in war, and simply ceased hostilities; in 1720, when France and Spain ceased hostilities; and in 1801, in the war of Russia against Persia. The wars waged by Spain with her South American colonies, ceased in 1826 some time before the independence of the different states was acknowledged. The independence of Venezuela was not fully recognized by Spain till twenty-five years after the cessation of active hostilities.

The uncertainties resulting from such methods of terminating war have led in recent times to the general practice of making known by announcement the return of peace, even in cases of civil war. Such proclamations were made at the close of the Civil War in the United States in 1865 from time to time as hostilities ceased in different areas.¹³ In the case of The Protector the United States Supreme Court said in 1871 in regard to the duration of the American Civil War:

“Acts of hostility by the insurgents occurred at periods so various, and of such different degrees of importance, and in parts of the country so remote from each other, both at the commencement and the close of the late Civil War, that it would be difficult, if not impossible, to say on what precise day it began or terminated. It is necessary, therefore, to refer to some public act of the political departments of the government to fix the dates; and, for obvious reasons, those of the executive department, which may be, and in fact was, at the commencement of hostilities, obliged to act during the recess of Congress, must be taken.

“The proclamation of intended blockade by the President may, therefore, be assumed as marking the first of these dates,

¹³ 6 Messages and Papers of the Presidents, p. 308 ff.

and the proclamation that the war had closed as marking the second. But the war did not begin or close at the same time in all the states. There were two proclamations of intended blockade—the first, of the 19th of April, 1861 (12 Stat. 1258), embracing the states of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas; the second, of the 27th of April, 1861 (12 Stat. 1259), embracing the states of Virginia and North Carolina; and there were two proclamations declaring that the war had closed—one issued on the 2d of April, 1866 (14 Stat. 811), embracing the states of Virginia, North Carolina, South Carolina, Georgia, Florida, Mississippi, Tennessee, Alabama, Louisiana, and Arkansas; and the other, issued on the 20th of August, 1866 (14 Stat. 814), embracing the state of Texas.

“In the absence of more certain criteria, of equally general application, we must take the dates of these proclamations as ascertaining the commencement and the close of the war in the states mentioned in them.”¹⁴

EFFECT OF CESSATION OF HOSTILITIES.

165. The effect of the termination of war by the cessation of hostilities is usually to introduce the principle of *uti possidetis*.

While it may be difficult to determine at what period hostilities actually cease, yet, if that period is determined, it is customary to regard conditions prevailing at that time as the normal conditions, and to regard the territory and property held by either belligerent at the time of cessation as vested in the holder, *uti possidetis*.

“Unless the parties stipulate otherwise, the effect of a treaty of peace is that everything remains in such condition as it was at the time peace was concluded. Thus, all movable state property, as munitions, provisions, arms, money, horses, means of transport, and the like, seized by an invading belligerent, remain his property, as likewise do the fruits of immovable property seized by him. Thus, further, if nothing is stipulated regarding conquered territory, it remains in the hands of

¹⁴ The Protector, 12 Wall. 700, 20 L. Ed. 463.

the possessor, who can annex it. But it is nowadays usual, although not at all legally necessary, for the conqueror, desirous of retaining conquered territory, to stipulate cession of such territory in the treaty of peace.”¹⁵

TREATY OF PEACE.

166. In modern times, war most frequently comes to an end by a treaty of peace.

Treaties of peace are now usually preceded by preliminary agreements embodying the bases for treaty negotiations. This agreement usually provides for the suspension of hostilities during negotiations, in order that the bases agreed upon may not be changed from day to day by the issue of the war. In the Spanish-American War of 1898 the protocol of August 12, 1898, containing the agreement to appoint commissioners to treat of peace upon certain conditions, also contained an agreement to suspend hostilities from that date. Proclamations suspending hostilities were immediately issued.¹⁶ The treaty of peace was not concluded till December 10, 1898. In the Russo-Japanese War negotiations looking toward peace were begun at Portsmouth, N. H., August 9, 1905. The envoys came to terms on August 29th, and a protocol suspending hostilities was issued September 1st.¹⁷ The treaty of peace was signed on September 5th.

The preliminary agreements preparatory to a treaty of peace are frequently made through the friendly offices of a third power. The ambassador of France acted for Spain in 1898; the President of the United States was instrumental in bringing the representatives of Russia and Japan together in 1905. According to article 3 of the Hague Convention of 1907 on the Pacific Settlement of International Disputes:

“Powers strangers to the dispute have the right to offer good offices or mediation even during the course of hostilities.

“The exercise of this right can never be regarded by either of the parties in dispute as an unfriendly act.”

¹⁵ 2 Oppenheim, Int. Law, § 273.

¹⁶ Foreign Relations U. S., 1898, 828.

¹⁷ Takahashi, Int. Law during Russo-Japanese War, 219.

SCOPE OF A TREATY OF PEACE.**167. A treaty of peace—**

- (a) In general, puts an end to hostile relations between the belligerents.
- (b) Usually provides for the settlement of the differences leading to war.
- (c) Usually specifies the conditions of release of prisoners of war.
- (d) Usually provides for claims of or against nationals of either party arising during or in consequence of the war.
- (e) May review or confirm former treaties, provide for cession of territory, establishment of new boundaries, etc.

(a) Treaties at the close of a war are often extended to cover many other matters than those which would be included in a treaty of peace in the strict sense. A treaty of peace is primarily a treaty to put an end to the hostile relations of the belligerents. Treaties of peace and amity often mark the conclusion of a war and cover many topics not involved in the simple conclusion of war, as the treaty of peace and amity between the United States and Great Britain in 1814 included an article upon the abolition of the slave trade.

(b) Treaties of peace usually provide for the settlement of the difficulties which have led to the war.¹⁸ The treaty of 1814 between the United States and Great Britain did not, however, mention these difficulties.

(c) By the sixth article of the Spanish-American treaty of December 10, 1898, the United States and Spain reciprocally agree to return at state expense prisoners to their home countries. Russia and Japan mutually agreed in 1905 to turn over prisoners into the hands of commissioners duly appointed by each state.

(d) The provision of treaties of peace in regard to claims is illustrated in the Spanish-American Treaty of December 10, 1898:

¹⁸ The second article of the Russo-Japanese Treaty of September 5, 1905, acknowledges Japan's position in the Far East. *Id.* p. 774.

By the first article of the Spanish-American Treaty of December 10, 1898, Spain relinquishes all claim to the sovereignty of Cuba. 30 Stat. 1755.

"Article VII. The United States and Spain mutually relinquish all claims for indemnity, national and individual, of every kind, of either government, or of its citizens or subjects, against the other government, that may have arisen since the beginning of the late insurrection in Cuba and prior to the exchange of ratifications of the present treaty, including all claims for indemnity for the cost of the war.

"The United States will adjudicate and settle the claims of its citizens against Spain relinquished in this article."

(e) European treaties of peace since the seventeenth century contain many instances of the renewal or confirmation of former treaties. The Treaty of Utrecht, 1714, has often been confirmed. Sometimes a clause makes a general renewal of all treaties existing between the states at the outbreak of the war. Other matters are included as the conditions may make expedient, as the Spanish-American Treaty of December 10, 1898, contained an article providing that for the cession of the Philippine Islands:

"The United States will pay to Spain the sum of twenty million dollars (\$20,000,000) within three months after the exchange of the ratifications of the present treaty."

EFFECT OF A TREATY OF PEACE.

168. While the final effects of a treaty of peace may be determined by the scope of its provisions, the immediate effects are to put an end to hostile relations between the belligerents and to put an end to the status of neutrality on the part of other states.

Sometimes a treaty provides for the restoration of the status quo ante bellum; sometimes it follows the doctrine of uti possidetis; sometimes it establishes one doctrine in certain cases and the other in other cases. In absence of provisions in the treaty of peace, the doctrine of uti possidetis is usually followed, and each belligerent retains what he has in his possession. In case the principle of restoration of the status quo ante bellum is adopted, lawful prize and booty would not ordinarily be restored. This principle was largely followed in the treaty of peace between the United States and Great Britain in 1814.

Some treaties may revive ipso facto on the conclusion of a treaty of peace. Certain private rights which have been suspended during the war revive. War does not necessarily terminate contracts, but suspends the judicial enforcement of some contracts.¹⁹ Some contracts are generally dissolved, as partnership, and do not revive by a treaty of peace. The general principle was stated in 1823 by the United States Supreme Court as follows:

"We think, therefore, that treaties stipulating for permanent rights and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace."²⁰

In general a treaty determines transfer of sovereignty. From the treaty of peace between the United States and Spain after the Spanish-American War in 1898, it is evident that the United States did not consider that it had by the simple fact of effective military occupation obtained the sovereignty over or gained title to Spanish territory. Article II of that treaty states that "Spain cedes to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and the island of Guam in the Marianas or Ladrones," though the forces of the United States were at the time occupying Porto Rico.

It is evident that the United States and Spain, after the war of 1898, considered it necessary to agree to abrogate and annul the treaties existing prior to the war. Provision to this effect is made in article XXIX of the Treaty of Friendship and General Relations of July 3, 1902, as follows:

"All treaties, agreements, conventions and contracts between the United States and Spain prior to the Treaty of Paris shall be expressly abrogated and annulled, with the exception of the treaty signed the seventeenth of February, 1834, between the two countries, for the settlement of claims between the United

¹⁹ *Semmes v. City Fire Ins. Co.* 13 Wall. 158, 20 L. Ed. 490.

²⁰ *Society for Propagation of the Gospel v. New Haven*, 8 Wheat. 464, 5 L. Ed. 662.

States of America and the government of His Catholic Majesty, which is continued in force by the present convention."

As neutrality can exist only during war, the restoration of peace puts an end to that relationship. The rights and obligations of neutrality are at an end.

PROCLAMATION.

169. The termination of a civil war is usually by some act of the political department.

The surrender of the main armies of the party opposing the established state does not necessarily terminate a civil war, for hostilities may be renewed in other regions and by other groups. There is usually no responsible authority which can control those who may engage in military uprisings in different sections. There is also no political authority in the insurgent party competent to make a binding treaty. When, however, the political department of an established state is satisfied that the war is at an end, and issues a proclamation to that effect, this action is binding upon the courts, and is sufficient evidence of the termination of hostilities. War may close at different times in different regions by proclamations to that effect, as in the case of the American Civil War.²¹

POSTLIMINIUM.

170. The term "postliminium" is used to indicate the return to the original sovereignty of that which has been for a time under control of an enemy.

The term "postliminium," derived from the Roman law idea that a person, who had been captured and taken beyond (post) the boundary (limen), on return recovered his former status, served a convenient purpose. By an analogy it was applied to the return to former status when a territory which

²¹ The Protector, 12 Wall. 700, 20 L. Ed. 463; Brown v. Hiatt, 15 Wall. 177, 21 L. Ed. 128; Adger v. Alston, 15 Wall. 555, 21 L. Ed. 234; Batesville Institute v. Kauffman, 18 Wall. 151, 21 L. Ed. 775.

had been occupied by an enemy came again under the former sovereignty. The doctrine was applied in various directions in municipal law.

In international law it was considered as applicable to territory which had for a time been in the power of the enemy as well as to persons. It is now held that sovereignty does not pass to the military occupant, but that its exercise is for the time suspended. Acts of the occupant which are legitimate under the rules of international law of war are valid when the occupancy is at an end. The occupant may carry on the ordinary administrative functions, and his acts are as valid as those of the sovereign. The occupant has right to the use of the ordinary revenue under the law. Receipts which the occupant gives for services rendered or taxes paid are valid.

If the occupant has performed acts which are not legal under the law of military occupation, these acts are invalid. If he has sold the public domain, he has gone beyond his legitimate authority, and the title will not hold against the state when it is restored to power. The occupant would have a right to the income from the public domain during his occupancy. If private property is seized and sold, the title is not valid, when the occupant is driven out, retires, or when peace is restored, because the confiscation of private property is forbidden under the laws of war. Such property reverts to the original owners, when the authority of the legitimate sovereign is restored, and the purchaser has no redress.

The analogy to the old idea of postliminium is by some writers not considered sufficiently close to warrant the use of the word, and they maintain that it obscures the meaning of rules which are in themselves simple and based on the fact that military occupation suspends the operation of sovereignty, but does not establish a new sovereignty, which may act without regard to previously existing rights, or in disregard of the laws of war.²²

²² Bonfils, *Droit Int.* No. 1710; 3 Nys, *Droit Int.* 738; Ullmann, *Volkerrecht*, § 169.

AMNESTY.**171. Clauses are frequently included in treaties of peace by which immunity is granted for offenses in nature of the violation of the rules of war.**

Amnesty is a kind of act of oblivion. Even if such a clause is not included in the treaty, it is generally understood that acts in the line of hostilities will not be penalized. Amnesty does not give immunity for ordinary crimes which have no direct connection with the war; i. e., foraging might be allowed in time of war for war purposes, but similar action might be liable to penalty if not for war purposes. Unless specially incorporated in the treaty, treason against the state would not be included in a general amnesty. Amnesty does not give any relief from penalty already suffered, whether in person or property.²³

During and after the Civil War in the United States, several proclamations of amnesty were issued. The earlier proclamations did not confer amnesty upon all, but made exception of certain classes. The proclamation of December 25, 1868, was general in its nature; President Johnson saying that "I, by virtue of the power vested in me by the Constitution, and in the name of the sovereign people of the United States, do hereby proclaim and declare, unconditionally and without reservation, to all and to every person who, directly or indirectly, participated in the late insurrection or rebellion a full pardon and amnesty for the offense of treason against the United States or of adhering to their enemies during the late Civil War, with restoration of all rights, privileges, and immunities under the Constitution and the laws which have been made in pursuance thereof."²⁴

²³ United States v. Dunnington, 146 U. S. 338, 13 Sup. Ct. 79, 36 L. Ed. 996.

²⁴ 6 Messages and Papers of the Presidents, p. 708.

PART VI

RELATIONS OF NEUTRALS

WILS. INT. L.

(283)*

CHAPTER XXII.

NATURE OF NEUTRALITY.

- 172. Neutrality Defined.
- 173. Development.
- 174. Neutralization.
- 175. Declaration.
- 176. Divisions.

NEUTRALITY DEFINED.

- 172. Neutrality is, in general, abstention by a state which is not party to a war from all participation in the war, and may extend to the obligation to prevent, tolerate, or regulate certain acts upon the part of the belligerents.**

Impartiality in the treatment of belligerents is not necessarily neutrality in the modern sense, for it would be possible for a state to grant a like privilege to both belligerents, when this privilege might be of no service to one belligerent and of greatest service to the other as in the use of ports. Modern neutrality proclamations, which sometimes prescribe that both "impartiality and neutrality" shall be observed toward the belligerents, define the "impartiality" as like treatment and "neutrality" as nonparticipation in the hostilities. Recent British proclamations provide for the observance of "a strict and impartial neutrality." Other proclamations contain similar provisions. The idea of the elements of neutrality in the modern sense was stated in the proclamation of President Washington of December 3, 1793, when he said: "The duty and interest of the United States require that they should with sincerity and good faith adopt and pursue a conduct friendly and impartial toward the belligerent powers."¹ Conduct that shall be at the same time "friendly and impartial" is now regarded as obligatory upon a neutral state. The line of demarcation

¹ 1 Richardson, Messages and Papers of the Presidents, 156.

in neutral duties of abstention, prevention, toleration, and regulation in practice often becomes indistinct, and accurate classification may not always be possible.

DEVELOPMENT.

173. In early times neutrality was not recognized. The idea is largely a product of the nineteenth century. The practice in regard to neutrality necessarily has become more defined as states have become more closely related.

The Development of the Idea of Neutrality.

The Greek and Latin languages have no words which clearly express the meaning of the words "neutral" and "neutrality." The Romans made use of the words, "amici," "medii," "pacati," and "socii" to convey some of the ideas now conveyed by the word "neutrality." Grotius in 1625 made use of the expression, "De his qui in bello medii sunt," as a title for his brief chapter upon the subject of their rights, in which he said: "It is the duty of those who stand apart from a war to do nothing which may strengthen the side whose cause is unjust, or which may hinder the movements of him who is carrying on a just war, and, in a doubtful case, to act alike to both sides, in permitting transit, in supplying provisions to the respective armies, and in not assisting persons besieged."²

In the seventeenth century there were frequent attempts to establish grades of neutrality as natural, strict, perfect, imperfect, qualified, conditional, conventional, etc.³

Bynkershoek, in 1737, said: "I call those 'non-enemies' who are of neither party in a war. If I am neutral, I cannot advantage one party lest I injure the other."⁴

Vattel says in 1758: "Neutral nations, during a war, are those who take no one's part, remaining friends common to both parties, and not favoring the armies of one of them to the prejudice of the other."⁵ This definition, and the explanations which Vattel gives of its meaning, shows a less

² Grotius, *De Jure Belli ac Pacis*, lib. 3, C.

³ Pufendorf, *Le Droit de la Nature et des Gens*, liv. VIII, c. VI.

⁴ *Quæstiones Juris Publici*, I, IX, "qui neutrarum partium sunt."

⁵ *Droit des Gens*, III, 103.

clear conception of the idea of neutrality than that set forth by Bynkershoek more than twenty years earlier. The idea of Vattel, of impartiality rather than strict neutrality, generally prevailed during the eighteenth century. Toward the end of that century the distinction between a "strict or perfect neutrality" and an "imperfect neutrality" began to be made among those writing upon the law of nations.

Wheaton in 1836 says: "There are two species of neutrality recognized by international law. These are: (1) Natural or perfect, neutrality; and (2) imperfect, qualified, or conventional neutrality.

"First. Natural, or perfect, neutrality is that which every sovereign state has a right, independent of positive compact, to observe in respect to the wars in which other states may be engaged. * * *

"Second. Imperfect, qualified, or conventional neutrality is that which is modified by special compact." ⁶

Kleen in 1898 says that, when neutral, a state keeps out of the hostilities and refrains from any participation or interference in the contention, while maintaining strict impartiality.⁷

It is, however, now generally recognized that neutrality may in practice involve more than refraining from participation or interference, and the maintenance of strict impartiality. Neutrality places certain positive obligations upon the state. The failure to perform these obligations may have great effect upon the results of the war. By the Hague Convention Concerning Laws and Customs of War on Land of 1899, and by that of 1907 Respecting the Rights and Duties of Neutral Powers, a neutral state which receives on its territory troops belonging to the belligerent armies is under obligation to intern them as far as possible from the seat of war. In naval war a neutral state is likewise bound to exercise such care as the means at its disposal allow to prevent violation of its neutrality by belligerents. This may even involve the use of force by the

⁶ Elements of International Law, §§ 413-415.

⁷ "La neutralité est la situation juridique dans laquelle un état pacifique est, autant que possible, laissé en dehors des hostilités qui ont lieu entre des états belligérants, et s'abstient lui-même de toute participation ou ingérence dans leur différend, en observant vis-à-vis d'eux une stricte impartialité." 1 La Neutralité, p. 73.

neutral against a belligerent not observing the recognized principles of international law.

Development of Practice in Regard to Neutral Relations.

As war in early times was usually regarded as a state of affairs without law, there was in practice no respect for those who were not parties to the war. Rights of third parties could hardly develop till the rights of the parties to the war were somewhat defined. Belligerents were gradually compelled in practice to respect certain rights of commerce. Some of these rights were formulated in the *Consolato del Mare*, a maritime code of uncertain origin, probably of the thirteenth century, which provided for the freedom of neutral property on the sea. The rules of this code were, however, frequently disregarded in the wars before the end of the eighteenth century, and at this period there was great diversity in practice. There also grew up a difference in practice in regard to neutral rights and duties on land and on the sea. Toward the end of the eighteenth century it was regarded as permissible for a neutral to allow its troops to serve a foreign power and to allow its ports to be used for war purposes.

By the Armed Neutrality of 1780 the states of Northern Europe, under the lead of Russia, set forth, among other principles, that free ships make free goods, except contraband of war, which was reaffirmed by the Armed Neutrality of 1800. There was also a declaration against paper blockades. Freedom of commerce began to be provided for in treaties also. Article 23 of the treaty between the United States and France in 1778 provided that free ships should make free goods. The principle was incorporated in other United States treaties of the period.⁸ The question received much attention both from American and foreign publicists.

In 1793 the disregard of belligerents for neutral territory received a marked illustration in the conduct of M. Genêt, the

⁸ "If one of the contracting parties should be engaged in war with any other power, the free intercourse and commerce of the subjects or citizens of the party remaining neuter with the belligerent powers shall not be interrupted. On the contrary, in that case, as in full peace, the vessels of the neutral party may navigate freely to and from the ports and on the coasts of the belligerent parties, free

French minister to the United States. He issued letters of marque to American merchantmen, in order that they might cruise against British ships. He also proceeded to set up prize courts in connection with the French consulates. The action led to vigorous protests on the part of the United States,⁹ and later to the so-called neutrality act of June 5, 1794,¹⁰ which was subsequently renewed, and, with the act of April 20, 1818, became the basis of the neutrality practice of the United States.¹¹ This act was summarized in President Roosevelt's neutrality proclamation of February 11, 1901, in which he declares:

"That by the act passed on the 20th day of April, A. D. 1818, commonly known as the 'neutrality law,' the following acts are forbidden to be done, under severe penalties, within the territory and jurisdiction of the United States, to wit:

"1. Accepting and exercising a commission to serve either of the said belligerents by land or by sea against the other belligerent.

"2. Enlisting or entering into the service of either of the said belligerents as a soldier, or as a marine, or seaman, on board of any vessel of war, letter of marque, or privateer.

"3. Hiring or retaining another person to enlist or enter himself in the service of either of the said belligerents as a soldier, or as a marine, or seaman on board of any vessel of war, letter of marque, or privateer.

"4. Hiring another person to go beyond the limits or jurisdiction of the United States with intent to be enlisted as aforesaid.

"5. Hiring another person to go beyond the limits of the United States with intent to be entered into service as aforesaid.

vessels making free goods, insomuch that all things shall be adjudged free which shall be on board any vessel belonging to the neutral party, although such things belong to an enemy of the other; and the same freedom shall be extended to persons who shall be on board a free vessel, although they should be enemies to the other party, unless they be soldiers in actual service of such enemy." Article 12, Treaty between United States and Prussia, 1785.

⁹ 1 American State Papers, Foreign Relations, 69, 140, 147, 160.

¹⁰ 1 Stat. p. 381, c. 50.

¹¹ Rev. St. §§ 5281-5291 (U. S. Comp. St. 1901, pp. 3599-3602).

"6. Retaining another person to go beyond the limits of the United States with intent to be enlisted as aforesaid.

"7. Retaining another person to go beyond the limits of the United States with intent to be entered into service as aforesaid. (But the said act is not to be construed to extend to a citizen or subject of either belligerent who, being transiently within the United States, shall, on board of any vessel of war, which, at the time of its arrival within the United States, was fitted and equipped as such vessel of war, enlist or enter himself, or hire or retain another subject or citizen of the same belligerent, who is transiently within the United States, to enlist or enter himself, to serve such belligerent on board such vessel of war, if the United States shall then be at peace with such belligerent.)

"8. Fitting out and arming, or attempting to fit out and arm, or procuring to be fitted out and armed, or knowingly being concerned in the furnishing, fitting out, or arming of, any ship or vessel with intent that such ship or vessel shall be employed in the service of either of the said belligerents.

"9. Issuing or delivering a commission within the territory or jurisdiction of the United States for any ship or vessel to the intent that she may be employed as aforesaid.

"10. Increasing or augmenting, or procuring to be increased or augmented, or knowingly being concerned in increasing or augmenting, the force of any ship of war, cruiser, or other armed vessel, which at the time of her arrival within the United States was a ship of war, cruiser, or armed vessel in the service of either of the said belligerents, or belonging to the subjects of either, by adding to the number of guns, of such vessels, or by changing those on board of her for guns of a larger caliber, or by the addition thereto of any equipment solely applicable to war.

"11. Beginning or setting on foot, or providing or preparing the means for, any military expedition or enterprise to be carried on from the territory or jurisdiction of the United States against the territories or dominions of either of the said belligerents."¹²

¹² Foreign Relations U. S., 1904, p. 32.

The acts were approved as the embodiment of good practice, particularly in Great Britain. In 1819 the British Parliament passed an act embodying similar principles.¹³ This act remained in force till the passage of the British Foreign Enlistment Act of 1870,¹⁴ which enlarges the range of prohibited actions.

Thus in early times the only relations which were regarded as possible were either of peace or of war. Later there were grades of impartiality. There then developed a doctrine of general abstention of the neutral state from participation, either directly or indirectly, in the hostilities. Since the middle of the nineteenth century there has been a growing recognition of the positive obligation of the neutral state to prevent or prohibit certain acts within its territorial jurisdiction, such as use of its territory as a military base. With the development of neutrality there has also gone an increasing recognition of the right of the belligerent to carry on hostilities and the obligation of the neutral to submit to reasonable constraint because of the existence of hostilities. This duty of toleration is most frequently seen in the exercise of the right of visit and search.

The neutral rights and obligations as at present developed, therefore, involve the abstention from, the prevention of, and the toleration of certain acts. Some of these are made subjects of international agreement in the Hague Conventions of 1907, thus showing in practice the full recognition of the status of neutrality.

NEUTRALIZATION.

174. By conventions, the subjects of an agreement are sometimes given a full or a qualified neutral status.

(a) States or portions of states are sometimes neutralized. Such states are bound to refrain from offensive hostilities, but are usually permitted to keep an army for defense. The de-

¹³ St. 59 Geo. III, c. 69.

¹⁴ St. 33 & 34 Vict. c. 90. In *Regina v. Jameson* [1896] 2 Q. B. 425, this act was held to be operative as to a British subject who violated it by furnishing assistance from a place outside British dominion.

gree of restraint upon the action of the state varies according to the convention. Provision was made for the perpetual neutralization of Switzerland at the Congress of Vienna, on March 20, 1815, and the Confederation agreed to its terms on May 27th of the same year.¹⁵ The neutralization of Belgium was provided for in the Treaty of London, November 15, 1831. The neutrality of the islands of Corfu and Paxo was provided for in the Treaty of London of March 29, 1864.

(b) The neutralization of commercial routes which are in the main lines of the world's commerce is considered expedient. It has been proposed that certain routes commonly traversed by commerce upon the high seas should be neutralized. The Suez Canal is neutralized by the Convention of Constantinople of October 29, 1888,¹⁶ to which nine states are parties. The Panama Canal is to a certain extent neutralized by a convention between the United States and Great Britain of November 18, 1901.¹⁷

¹⁵ 1 Hertslet, 64.

¹⁶ Parliamentary Papers, Commercial, No. 2 (1889); *Id.* France, No. 1, 1904, p. 9; Holland, *Studies in Int. Law*, p. 269.

¹⁷ "Article III. The United States adopts, as the basis of the neutralization of such ship canal, the following rules, substantially as embodied in the Convention of Constantinople, signed the 28th October, 1888, for the free navigation of the Suez Canal, that is to say:

"1. The canal shall be free and open to the vessels of commerce and of war of all nations observing these rules, on terms of entire equality, so that there shall be no discrimination against any such nation, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable.

"2. The canal shall never be blockaded, nor shall any right of war be exercised nor any act of hostility be committed within it. The United States, however, shall be at liberty to maintain such military police along the canal as may be necessary to protect it against lawlessness and disorder.

"3. Vessels of war of a belligerent shall not revictual nor take any stores in the canal except so far as may be strictly necessary; and the transit of such vessels through the canal shall be effected with the least possible delay in accordance with the regulations in force, and with only such intermission as may result from the necessities of the service.

"Prizes shall be in all respects subject to the same rules as vessels of war of the belligerents.

(c) The conventions based upon the Geneva Convention of August 22, 1864, have for their object the exemption from the consequences of war of the matériel and personnel engaged in care of the sick, wounded, or shipwrecked in war.¹⁸

DECLARATION OF NEUTRALITY.

175. While the practice is not uniform, it is customary for a neutral state to issue a declaration making known the position it will assume during the hostilities.

Sometimes such proclamations are brief and general; others may enter into details in regard to the attitude of the state and the conduct of public and private persons. The German declaration of February 13, 1904, was brief and general.¹⁹

"4. No belligerent shall embark or disembark troops, munitions of war, or warlike materials in the canal, except in case of accidental hindrance of the transit, and in such case the transit shall be resumed with all possible despatch.

"5. The provisions of this article shall apply to waters adjacent to the canal, within three marine miles of either end. Vessels of war of a belligerent shall not remain in such waters longer than twenty-four hours at any one time, except in case of distress, and in such case, shall depart as soon as possible; but a vessel of war of one belligerent shall not depart within twenty-four hours from the departure of a vessel of war of the other belligerent.

"6. The plant, establishments, buildings, and all work necessary to the construction, maintenance, and operation of the canal shall be deemed to be part thereof, for the purposes of this treaty, and in time of war, as in time of peace, shall enjoy complete immunity from attack or injury by belligerents, and from acts calculated to impair their usefulness as part of the canal."

¹⁸ Geneva Convention of July 6, 1906, Appendix, p. 508; Convention for Adaptation to Naval War of Principles of Geneva Convention, The Hague, 1907, Appendix, p. 549.

¹⁹ "German Empire—Proclamation. According to official declarations which have been made here by the Imperial Russian Government and the Imperial Japanese Government, a state of war now exists between Russia and Japan. This is hereby proclaimed, with the further announcement that it is the duty of every one within the territory of the Empire and in the German protectorates, as well as of Germans in foreign lands, to refrain from all acts contrary to the neutrality of Germany.

"Berlin, February 13, 1904.

"The Imperial Chancellor,

Count von Bülow."

The Brazilian regulations of May 5, 1898, were detailed. The Brazilian regulations contained the general provision that "individuals residing in Brazil, citizens or foreigners, must abstain from all participation and aid in favor of either of the belligerents, and may not do any act which might be considered as hostile to either one of the two parties, and, therefore, contrary to the obligations of neutrality," and among the special provisions were those relating to privateers, enlistment, exportation of war material, use of telegraph, twenty-four hour sojourn of belligerent ships, entrance of prizes, coaling, provisioning, and fitting of belligerent ships of war, sailing of merchant ships, etc.²⁰

The United States took an advanced step in 1904 in regulating by proclamation the conduct of national civil, military, and naval officials as regards their relations to belligerents.²¹

²⁰ Foreign Relations U. S., 1898, p. 846.

²¹ "Executive order:

"White House, March 10, 1904.

"All officials of the government, civil, military, and naval, are hereby directed not only to observe the President's proclamation of neutrality in the pending war between Russia and Japan, but also to abstain from either action or speech which can legitimately cause irritation to either of the combatants. The government of the United States represents the people of the United States, not only in the sincerity with which it is endeavoring to keep the scales of neutrality exact and even, but in the sincerity with which it deprecates the breaking out of the present war, and hopes that it will end at the earliest possible moment and with the smallest possible loss to those engaged. Such a war inevitably increases and inflames the susceptibilities of the combatants to anything in the nature of an injury or slight by outsiders. Too often combatants make conflicting claims as to the duties and obligations of neutrals, so that even when discharging these duties and obligations with scrupulous care it is difficult to avoid giving offense to one or the other party. To such unavoidable causes of offense, due to the performance of national duty, there must not be added any avoidable causes. It is always unfortunate to bring Old World antipathies and jealousies into our life, or by speech or conduct to excite anger and resentment toward our nation in friendly foreign lands; but in a government employé, whose official position makes him in some sense the representative of the people, the mischief of such actions is greatly increased. A strong and self-confident nation should be peculiarly careful, not only of the rights, but of the susceptibilities, of its neighbors; and nowadays

DIVISION OF SUBJECT.

176. Relations existing between neutrals and belligerents naturally fall under two heads:

- (a) The relations existing between the belligerents and neutral states, as such.**
- (b) The relations existing between the belligerents and individuals.**

The Relations between Belligerents and Neutral States.

(a) The relations between the belligerents and neutral states are based upon the respect for the sovereign rights of the states. Established usage may determine what course should be pursued under certain circumstances. In recent years, particularly since the First Peace Conference at The Hague in 1899, treaties and general international agreements have been entered upon to establish uniformity of practice in time of war.

Relations between Belligerents and Neutral Individuals.

(b) Between belligerents and neutral individuals there exist no mutual obligations. The neutral individual owes no obligation to the belligerent, and under ordinary circumstances the belligerent exercises no jurisdiction over the neutral individual. In general, the neutral individual may engage in commerce in time of war as in time of peace. There are conditions under which the individual may act in such manner as to constitute a material interference with the conduct of the hostilities. The belligerent then claims the right to exercise such authority as will prevent or deter the neutral from thus acting. The belligerent also claims the right to exercise reasonable care to determine whether such action is contemplated as by visit and search.

all the nations of the world are neighbors one to the other. Courtesy, moderation, and self-restraint should mark international, no less than private, intercourse.

"All the officials of the government, civil, military, and naval, are expected so to carry themselves both in act and in deed as to give no cause of just offense to the people of any foreign and friendly power—and with all mankind we are now in friendship.

"Theodore Roosevelt."

Foreign Relations U. S., 1904, p. 185.

The action of the neutral individual may sometimes be of such character as to show that the neutral state has not taken reasonable precautions against allowing neutral territory to be used as a base for hostile purposes. It is customary for the neutral state to tolerate interference with the acts of neutral individuals in the time of war which would not be allowed in time of peace, and also to take precautionary measures and assume obligations in regard to acts of its nationals which it would not take or assume in time of peace. The most frequent relationships into which belligerents and neutral individuals come involve :

- (1) Ordinary commerce.
- (2) Visit and search.
- (3) Contraband.
- (4) Blockade.
- (5) Continuous voyage.
- (6) Unneutral service.
- (7) Convoy.
- (8) Prize.

CHAPTER XXIII.

VISIT AND SEARCH.

177. Visit and Search.
178. The Exercise of the Right.
179. Method of Visit and Search.
180. Exemption from and Limitation of Right.
181. Convoy.
182. Grounds of Capture.
183. Transfer of Property.
184. Treatment of Captured Vessels.
185. Destruction or Appropriation of Property at Sea.

VISIT AND SEARCH IN WAR.

- 177. In time of war, visit and search is a right in accord with which a belligerent vessel may stop, visit, and search a neutral vessel, in order to learn whether it is in any way connected with the hostilities.**

By visit and search the belligerent usually endeavors to ascertain the nationality of the vessel, whether neutral or belligerent; the nature of the cargo, whether contraband or innocent; the destination, whether enemy or neutral; and the nature of the service, whether neutral or unneutral.¹

In order to ascertain the identity or nationality of a vessel which would not be liable to visit and search, a belligerent sometimes exercises what is called the "right of approach."

THE EXERCISE OF THE RIGHT OF VISIT AND SEARCH.

- 178. The right of visit and search in general may be exercised—**
- (a) **By regularly commissioned war vessels of the belligerents.**
 - (b) **Over private vessels of neutrals.**
 - (c) **At any point outside of neutral jurisdiction.**
 - (d) **During the period of the war.**

¹ The right of visiting and searching merchant ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be

(a) Before the Declaration of Paris of 1856, by which "privateering is and remains abolished," there was abuse by privateers of the right of visit and search, even though the privateers were commissioned. There was no objection to the exercise of this right by the regular naval forces of the belligerents. The neutral has, however, a right to demand that there shall be no interference with his commerce in time of war by vessels of the belligerents for whose acts the belligerent does not assume full responsibility. The Hague Convention of 1907, therefore, provided that "a merchant ship converted into a warship cannot have the rights and duties accruing to such vessels unless it is placed under the direct authority, immediate control, and responsibility of the power whose flag it flies."² The command of such vessels must be in regularly commissioned officers of the state.

(b) As persons residing within neutral jurisdiction are permitted to carry on commerce in the time of war as in the time of peace, the belligerent as a measure of reasonable protection must assure himself or be assured that the neutral is not acting in such a manner as to injure him or to aid the other belligerent.

The method of gaining this assurance is commonly by visit to a neutral private vessel, and, if there is then doubt, by search of the vessel. It has been proposed that vessels certificated as innocent by neutral officials authorized for this purpose be exempted from search.³

Before the Declaration of London, 1909, neutral private vessels under convoy were by some states allowed exemption, but Great Britain had not until that time admitted this as a right.

the destinations, is an incontestable right of the lawfully commissioned cruisers of a belligerent nation. 1 C. Rob. 340.

² Conversion of Merchant Ships into War Ships, ante, p. 314.

³ Earl Grey to Sir Edward Fry, First British Plenipotentiary to Second Hague Peace Conference, June 12, 1907: "29. His Majesty's government would further be glad to see the right of search limited in every practicable way; e. g., by the adoption of a system of consular certificates declaring the absence of contraband from the cargo, and by the exemption of passenger and mail steamers upon defined routes, etc." Correspondence Respecting Second Peace Conference, Parliamentary Papers, Misc. No. 1 (1908) p. 17.

Public vessels of neutrals, bound by good faith to act as neutrals, are exempt from visit and search, though there has been some question as to the extension of exemption to such public vessels as may be engaged in occupations of a commercial nature; e. g., the postal service. It is maintained that, if such vessels are commanded by a regularly commissioned officer of the navy, his word should be sufficient assurance of the character of the vessel.⁴

(c) The right of search may in general be exercised at any point within the jurisdiction of either belligerent, on the high seas, and at any point outside of neutral jurisdiction. Restrictions upon the exercise of war rights are sometimes provided in treaties.⁵

(d) The right of visit and search continues during the period of the war. An armistice or suspension of hostilities binds the belligerent forces, but does not put obligations upon neutrals; therefore the belligerent for his own protection would naturally continue the exercise of visit and search until peace is assured. The armistice agreed upon between Russia and Japan September 1, 1905, regulating the action of their forces, specifically stated that "maritime captures will not be suspended by the armistice."

METHOD OF VISIT AND SEARCH.

179. Where treaty provisions in regard to the exercise of the right of visit and search do not exist, the right should be exercised with consideration for the general rights of the neutral.

The treaty between the United States and Italy of February 26, 1871, provides that "in order to prevent all kinds of disorder in the visiting and examination of the ships and cargoes

⁴ Perels, *Öffentliche Seerecht*, § 52, IV.

⁵ "The canal shall never be blockaded, nor shall any right of war be exercised nor any act of hostility be committed within it. The United States, however, shall be at liberty to maintain such military police along the canal as may be necessary to protect it against lawlessness and disorder." Article III, Treaty between Great Britain and United States, Nov. 18, 1901, Trans-Isthmian Canal.

of both the contracting parties on the high seas, they have agreed mutually that, whenever a vessel of war shall meet with a vessel not of war of the other contracting party, the first shall remain at a convenient distance, and may send its boat with two or three men only, in order to execute the said examination of the papers, concerning the ownership and cargo of the vessel, without causing the least extortion, violence, or ill treatment, and it is expressly agreed that the unarmed party shall in no case be required to go on board the examining vessel for the purpose of exhibiting his papers, or for any other purpose whatever.”⁶

The method prescribed for the United States naval forces in the Spanish-American War, in 1898, was as follows: “The right should be exercised with tact and consideration, and in strict conformity with treaty provisions, wherever they exist. The following directions are given, subject to any special treaty stipulations: After firing a blank charge, and causing the vessel to lie to, the cruiser should send a small boat, no larger than a whale boat, with an officer to conduct the search. There may be arms in the boat, but the men should not wear them on their persons. The officer, wearing only his side arms, and accompanied on board by not more than two men of his boat’s crew, unarmed, should first examine the vessel’s papers to ascertain her nationality and her ports of departure and destination. If she is neutral, and trading between neutral ports, the examination goes no further. If she is neutral, and bound to an enemy’s port not blockaded, the papers which indicate the character of her cargo should be examined. If these show contraband of war, the vessel should be seized; if not, she should be set free, unless, by reason of strong grounds of suspicion, a further search should seem to be requisite.”⁷

The Japanese Regulations Governing Captures at Sea, published in 1904, provide that “the boarding officer, before he leaves the vessel, shall ask the master whether he has any complaint regarding the procedure of visiting or searching, or any other points, and if the master makes any complaints he

⁶ Article 18, 17 Stat. 854.

⁷ General Order 492, U. S. Navy Dept. June 20, 1898, No. 13.

shall request him to produce them in writing.”⁸

If the firing of the blank charge is not sufficient to cause a vessel to lie to, a shot may be fired across the bows; and, if this is not sufficient, the warship may use necessary force.

EXEMPTION FROM AND LIMITATION OF VISIT AND SEARCH.

180. (a) Public vessels of the neutral are exempt from visit and search.

(b) And neutral vessels under convoy of public vessels are generally exempt on proper assurances from the commander of the convoy.

(c) Neutral mail ships are searched only in case of necessity.

(a) Public vessels of the neutral, as representing the sovereignty, are exempt from visit and search. The word of the commander must be accepted as to the character of the vessel. Within the theater of actual hostile operations the movements of a neutral public vessel may necessarily be controlled, or the vessel may be approached in order to ascertain its identity.

(b) The exemption from visit and search of neutral merchant vessels under convoy of a neutral warship is generally granted upon proper assurance. “The verbal declaration of the commander of the convoy, on his word of honor, that the vessels under his protection belong to the nation whose flag he carries, and, when bound to an enemy’s port, that they have no contraband goods on board, shall be sufficient.”⁹ In case of grave suspicion, however, visit and search of a convoyed vessel is permissible. Up to 1908, Great Britain was unwilling to concede the right of exemption to vessels under convoy.¹⁰

⁸ Article LXII.

⁹ Treaty between United States and Italy, Feb. 26, 1871, Art. XIX, 17 Stat. 854.

¹⁰ Hall presented the English view as follows: “It is argued that the commander of a vessel of war in charge of a convoy represents his government, that his affirmation pledges the faith of his nation, and that the belligerent has a stronger guarantee in being assured by him that the vessels in company are not engaged in any illicit traffic than in examining for himself papers which may be fraudulent. But unless the neutral state is to exercise a minuteness of supervision over every ship issuing from her ports, which would

(c) Claims have been made that mail vessels should be exempt. The parties to The Hague Convention of 1907, while exempting the mails, were able to agree only that "the ship, however, may not be searched, except when absolutely necessary, and then only with as much consideration and expedition as possible."¹¹

CONVOY.

181. Neutral vessels sailing under the escort of a neutral warship are in general exempt from visit and search, though the commander of the warship is under obligation to furnish necessary information in regard to the vessels under his escort.

The so-called right of convoy is one which has been claimed for many years. Sweden claimed in the middle of the seventeenth century that neutral vessels under escort of a neutral warship were exempt from visit and search. From time to time during the following century the right was asserted, but it was not till toward the close of the eighteenth century that it received much consideration. After 1775 the right was frequently recognized in practice and acknowledged in treaties. While the Armed Neutrality of 1780 did not press the right of convoy, the Armed Neutrality of 1800 was largely due to the action of a British squadron in capturing a Danish warship which was convoying six merchant vessels. Great Britain

probably be impossible, and which it is not proposed to exact from her, the affirmation of the officer commanding the convoy can mean no more than that the ostensible papers of the vessels belonging to it do not show on their face any improper destination or object. Assuming that the officials at the ports of the neutral country are always able and willing to prevent any vessel laden with contraband from joining a convoy, the officer in command must still be unable to affirm of the vessels under his charge that no single one is engaged in carrying enemy's dispatches or military passengers of importance, that none have an ultimate intention of breaking a blockade, or, if the belligerent nation acts on the doctrine that enemy's goods in a neutral vessel can be seized, that none of the property in course of transport in fact belongs to the enemy." Int. Law (5th Ed.) 724.

At the International Naval Conference at London, 1908-09, Great Britain admitted the right of convoy.

¹¹ Right of Capture in Naval War, art. II, Scott, Hague Conferences, p. 283.

refused to recognize the right of convoy, even after the principle was generally accepted by the other nations. Great Britain at last admitted the right at the International Naval Conference in 1908-09.

While the right was generally admitted, its exercise was guarded by making the commander of the convoying warship responsible. In theory he was to furnish to the commander of the belligerent warship the information which that commander would obtain by a visit and search of the vessels under his escort. It was frequently prescribed in treaties that the verbal declarations of the commander of the convoy, "on his word of honor, that the vessels under his protection belong to the nation whose flag he carries, and, when bound to an enemy's port, that they have no contraband goods on board, shall be sufficient."

The Declaration of London, 1909, made the regulations in regard to convoy more definite, with the view to guarding the proper rights of neutrals without interfering with the rights of belligerents. While declaring that neutral vessels under national convoy are exempt from search, it makes it obligatory upon the commander of the convoy to furnish in writing the information which the commander of a belligerent warship might gain by a visit. Provision is also made for cases where the commander of the belligerent warship thinks the commander of the convoy may have been deceived. The belligerent commander may make known his suspicions to the convoying officer. "In such case it is for the commander of the convoy alone to investigate the matter. He must record the result of such investigation in a report, of which a copy is handed to the officer of the warship. If, in the opinion of the commander of the convoy, the facts shown in the report justify the capture of one or more vessels, the protection of the convoy must be withdrawn from such vessels."¹²

¹² Appendix, p. 583, articles 61 and 62.

GROUND OF CAPTURE.

182. The grounds for seizure of neutral private vessels are that the vessel or cargo is liable to confiscation, or that there is reasonable suspicion that the vessel is liable to confiscation.

Such grounds exist:

- (a) In case of absence or irregularity of the ship's papers.**
- (b) When the neutral vessel or its convoy resists search.**
- (c) When the vessel is under enemy convoy.**
- (d) If the vessel breaks or attempts to break a blockade.**
- (e) If the vessel is itself contraband or is carrying contraband.**
- (f) If the vessel is engaged in unneutral service.**

It is for the prize court to pronounce on the validity of the capture and to determine the penalty. If the commander making the capture has good reason to doubt the innocence of a vessel which he overhauls, he should send her to the prize court for adjudication. The grounds that would justify capture would not always be sufficient to condemn the neutral vessel or cargo. The prize court may pass upon evidence which the officer making the capture may not have, or may not feel it expedient to consider. His functions are administrative, and the judicial functions are properly left to the prize court.¹³

(a) The papers usually on board a neutral merchant vessel are (1) the register; (2) the crew list; (3) the log book; (4) the bill of health; (5) the charter party; (6) invoices; (7) bills of lading. Not all states require the same papers, however. The object of the officer visiting the vessel is to find out whether she is liable to capture. His object is in so far defeated as the papers are imperfect. The absence, destruction, defacement, evident falsification, or irregularity of any of the ship's papers is ground for capture, though the prize court may not consider this a sufficient ground for condemnation.

¹³ Prize courts deny damages or costs, as against captors, in cases of seizure made upon "probable cause"; that is to say, where there were circumstances sufficient to warrant suspicion, though not to warrant condemnation. *The Thompson*, 3 Wall. 155, 18 L. Ed. 55.

(b) When the neutral vessel itself, or its convoy, resists visit and search, the right of the belligerent is thwarted, and the vessel is liable to capture and condemnation. Simple attempt to escape by means of flight is not regarded as resistance, though the vessel may be brought to by the use of force. Refusal to admit the boarding officer, or refusal of the master to accompany the boarding officer, or to open at his request locked boxes, etc., is regarded as constituting resistance. The British decisions also regard resistance by the convoying vessel as resistance by the convoyed vessel, which makes the convoyed vessel liable to capture.¹⁴

(c) There has been a difference of opinion in regard to the treatment of a neutral merchant vessel under enemy convoy. It seems reasonable that this should be regarded as an attempt to avoid search by force, and may be construed as resistance. Writers in general, except Wheaton, so regard it, and consider the vessel thus escorted as liable to capture.¹⁵

A belligerent vessel, overhauling a neutral merchant vessel guilty of (d) breach of blockade, (e) carriage of contraband, or (f) unneutral service, should send the vessel to a prize court.

¹⁴ *The Maria*, 1 C. Rob. 340; Declaration of London, 1909, art. 63, Appendix, p. 584.

¹⁵ "The mere circumstance of sailing in company with a belligerent convoy had no such effect [defeat of the belligerent right of search]. Being an enemy, the belligerent had a right to resist. The masters of the vessels under his convoy could not be involved in the consequences of that resistance, because they were neutral, and had not actually participated in the resistance. They could no more be involved in the consequences of a resistance by the belligerent, which is his own lawful act, than is the neutral shipper of goods on board a belligerent vessel for the resistance of the master of that vessel, or the owner of neutral goods found in a belligerent fortress for the consequences of its resistance." Wheaton, *Int. Law*, § 533.

TRANSFER OF BELLIGERENT PROPERTY IN ANTICIPATION OF OR DURING WAR.

183. (a) The continental opinion was to regard the transfer of property to a neutral in anticipation of or during war as invalid;
- (b) While the American, British, and Japanese courts have inclined to throw the burden of proof of bona fide ownership upon the purchaser.
- (c) The Declaration of London, in 1909, recognized the transfer of an enemy vessel to a neutral flag before the outbreak of hostilities as in general valid, and the transfer after the outbreak of war as in general void, though making provisions in each case to guard the respective rights of the neutrals and of the belligerents.

In general, in time of war, goods shipped on account of the consignee and at his risk are regarded as his goods from the time of departure from port, and the character of these goods cannot change during the voyage. If they were hostile at the commencement of the voyage, they remain hostile till the end of the voyage.¹⁶ If a contract made before, and not in anticipation of, war places the risk upon the consignor and is proven to be bona fide, the property will remain in the consignor, and may be exempt.¹⁷ By the Declaration of London, 1909:

"Article 60. Enemy goods on board an enemy vessel retain their enemy character until they reach their destination, notwithstanding any transfer effected after the outbreak of hostilities while the goods are being forwarded.

"If, however, prior to the capture, a former neutral owner exercises, on the bankruptcy of an existing enemy owner, a recognized legal right to recover the goods, they regain their neutral character."¹⁸

(a) The French rule of July 26, 1778, required that, to be a valid sale, the transaction must be regular and in port before the commencement of war. The rule of the Institute of In-

¹⁶ *The Francis*, 1 Gall. 445, Fed. Cas. No. 5032.

¹⁷ *The Atlas*, 2 C. Rob. 299.

¹⁸ Declaration of London, 1909, c. VI, Appendix, p. 583.

ternational Law provided that in time of war new nationality could not be acquired by a belligerent vessel during a voyage.¹⁹

(b) The attitude of the United States and Japan was well stated in the British case of the *Ernest Merck*: "The law requires, where a vessel has been purchased shortly before the commencement of the war or during the war, clear and satisfactory proof of the right and title of the neutral claimant, and of the entire divestment of all right and interest in the enemy vendor. The onus is put upon the claimant to produce this proof; if he does not do so, the court cannot restore. The court is not called upon to say that the transaction is proved to be fraudulent; it is not required that the court should declare affirmatively that the enemy's interest remains; it is sufficient to bar restitution if the neutral claim is not unequivocally sustained by the evidence."²⁰

(c) (1) *Transfer before War*.—The General Report of the Drafting Committee of the International Naval Conference says in regard to the transfer to a neutral flag:

"Chapter V.—Transfer of Flag. An enemy merchant vessel is liable to capture, whereas a neutral merchant vessel is spared. It may therefore be understood that a belligerent cruiser encountering a merchant vessel which lays claim to neutral nationality has to inquire whether such nationality has

¹⁹ "L'acte juridique constatant la vente d'un navire ennemi faite durant la guerre doit être parfait, et le navire doit être enregistré conformément à la registration du pays dont il acquiert la nationalité, avant qu'il quitte le port de sortie. La nouvelle nationalité ne peut être acquise au navire par une vente faite en cours de voyage." Sec. 26, Règlement international des prises maritimes. 9 Annuaire.

²⁰ The *Ernst Merck*, Spinks, 98; The *Benito Estenger*, 176 U. S. 568, 20 Sup. Ct. 489, 44 L. Ed. 592.

Japanese Regulations Governing Captures at Sea, 1904:

"Art. VI. The following are enemy vessels: * * *

"4. Vessels, the ownership of which has been transferred before the war, but in expectation of its outbreak, or during the war, by the enemy state or its subjects to persons having residence in Japan or a neutral state, unless there is proof of a complete and bona fide transfer of ownership.

"In case the ownership of a vessel is transferred during its voyage, and actual delivery is not effected, such transfer of ownership shall not be considered as complete and bona fide."

been acquired legitimately or for the purpose of shielding the vessel from the risks to which she would have been exposed if she had retained her former nationality. This question naturally arises when the transfer is of a date comparatively recent at the moment at which the visit and search takes place, whether the transfer may actually be before, or after, the opening of hostilities. The question will be answered differently according as it is looked at more from the point of view of commercial or more from the point of view of belligerent interests. It is fortunate that agreement has been reached on a rule which conciliates both these interests so far as possible and which informs belligerents and neutral commerce of their position."

To provide for the protection of legitimate commerce without unduly restricting belligerent rights the following rule was adopted:

"Article 55. The transfer of an enemy vessel to a neutral flag, effected before the opening of hostilities, is valid, unless it is proved that such transfer was made in order to evade the consequences which the enemy character of the vessel would involve. There is, however, a presumption that the transfer is void if the bill of sale is not on board in case the vessel has lost her belligerent nationality less than sixty days before the opening of hostilities. Proof to the contrary is admitted.

"There is absolute presumption of the validity of a transfer effected more than thirty days before the opening of hostilities if it is absolute, complete, conforms to the laws of the countries concerned, and if its effect is such that the control of the vessel and the profits of her employment do not remain in the same hands as before the transfer. If, however, the vessel lost her belligerent nationality less than sixty days before the opening of hostilities, and if the bill of sale is not on board, the capture of the vessel would not give a right to compensation."

In general, the burden of proof that a transfer made before the war is not valid rests upon the captor. The fact that the bill of sale is not on board, in case of transfers made less than sixty days before the war, is presumptive evidence against the validity of the transfer, and justifies capture. "This pre-

sumption may be rebutted, though, if the bill of sale is not on board, the neutral vessel is not entitled to damages. For transfers made more than thirty days before the outbreak of hostilities, evidence that the transfer is made in order to evade the consequences of war is not considered, if the transfer is in other respects shown to be regular. Even for transfers within thirty days of the outbreak of hostilities, the burden of proof of invalidity rests upon the captor.

(2) *Transfers after War*.—In the case of transfer of vessels to a neutral flag after the outbreak of hostilities, the burden of proof is shifted and placed upon the one who claims to own the vessel. There are certain cases specified under which transfer is always regarded as invalid, as when en voyage, in a blockaded port, conditional or not legally complete. In other cases the one claiming ownership must prove that the transfer was commercial, rather than to evade the consequences to which a belligerent vessel is exposed in war. The rule is as follows:

“Article 56. The transfer of an enemy vessel to a neutral flag, effected after the opening of hostilities, is void unless it is proved that such transfer was not made in order to evade the consequences which the enemy character of the vessel would involve.

“There is, however, absolute presumption that a transfer is void:

“(1) If the transfer has been made during a voyage or in a blockaded port.

“(2) If there is a right of redemption or of revision.

“(3) If the requirements upon which the right to fly the flag depends according to the laws of the country of the flag hoisted have not been observed.”²¹

TREATMENT OF CAPTURED VESSEL.

184. When a belligerent commander has decided to capture a neutral merchant vessel—

- (a) **He should show his intention by taking possession of the vessel by a prize crew or otherwise.**

²¹ Declaration of London, 1909, c. V, Appendix, p. 583.

- (b) **He should send the prize in as good condition as possible, in general, to the nearest prize court of his home country. Sequestration is proposed by the Hague Convention of 1907.**
- (c) **As the title to neutral prize does not pass till condemnation, he should show due respect to persons and property on board the prize.**

(a) "To constitute in law a capture, some act should be done indicative of an intention to seize and to retain as prize; it is sufficient if such intention is fairly to be inferred from the conduct of the captor."²²

According to the British and Japanese rules: "If the captain of the man-of-war decides to capture a vessel, he shall inform her master of the reason, and shall take possession of the vessel by sending one officer and the required number of petty officers and men. If on account of bad weather or any other cause it is impossible to dispatch these officers and men, the captain of the man-of-war shall order the vessel to haul down her colors and to steer according to his direction. If the vessel does not obey the orders of the captain of the man-of-war, he may take any measures required for the occasion."²³

(b) The general rule is that the prize should be sent in the condition at the time of capture, if possible, to the nearest home port for adjudication. In recent years nearly all neutral states have by proclamation closed their ports to the entrance of belligerent vessels with prize.²⁴ The Hague Convention of 1907 Concerning the Rights and Duties of Neutral Powers in Naval War makes the following provisions:

"Article XXI. A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions.

"It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral power must order it to leave at once; should it fail to obey, the neutral

²² The Grotius, 9 Cranch, 368, 3 L. Ed. 762.

²³ Japanese Regulations Governing Captures at Sea, March 7, 1904. LXVII; British Manual Naval Prize Law, No. 238.

²⁴ See neutrality proclamations. Foreign Relations U. S., 1898, pp. 841-904; Id. 1904, 14-35.

power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew.

"Article XXII. A neutral power must, similarly, release a prize brought into one of its ports under circumstances other than those referred to in article XXI.

"Article XXIII. A neutral power may allow prizes to enter its ports and roadsteads, whether under convoy or not, when they are brought there to be sequestered pending the decision of a prize court. It may have the prize taken to another of its ports.

"If the prize is convoyed by a war ship, the prize crew may go on board the convoying ship.

"If the prize is not under convoy, the prize crew are left at liberty."

The United States adhered to this treaty, reserving and excluding article XXIII.²⁵ There is much difference of opinion as to the expediency of returning to the practice of sequestration which was once permitted. The great change in means and methods of maritime commerce has made capture at sea a complicated problem involving many interests; e. g., the capture of an ocean liner, or even its delay for visit and search, when having a large passenger list, varied cargo, mails, etc.

(c) The prize regulations of most states make explicit provision for the treatment of captured neutral vessels and of the persons on board. Some treaties also have similar provisions.²⁶ The commander of the vessel making the capture is usually held responsible for the treatment of the prize. Those on board are not, by the fact of capture of the vessel, prison-

²⁵ Appendix, p. 567.

²⁶ "In order effectually to provide for the security of the citizens and subjects of the contracting parties, it is agreed between them that all commanders of ships of war of each party, respectively, shall be strictly enjoined to forbear from doing any damage to, or committing any outrage against, the citizens or subjects of the other, or against their vessels or property; and if the said commanders shall act contrary to this stipulation, they shall be severely punished, and made answerable in their persons and estates for the satisfaction and reparation of said damages, of whatever nature they may be." Article XX, Treaty between United States and Italy, Feb. 26, 1871, 17 Stat. 854.

ers of war, though they may be detained as witnesses. They should be treated with consideration, and when passengers are on board these should be delayed as little as possible.

DESTRUCTION OR APPROPRIATION OF PROPERTY AT SEA.

185. (a) As a general rule captured neutral vessels should not be destroyed before adjudication.

(b) "As an exception, a neutral vessel which has been captured by a belligerent war ship, and which would be liable to condemnation, may be destroyed," if the sending in for adjudication "would involve danger to the safety of the war ship or to the success of the operations in which she is engaged at the time."

(c) Captured vessels or goods are sometimes, after appraisal and before adjudication, appropriated to public use.

(d) Vessels or goods are sometimes similarly treated under the exercise of the right of angary.

(a) While it is the general rule that captured neutral vessels should not be destroyed before adjudication, certain regulations issued during recent years have in their wording made no distinction as to the nationality of vessels liable to destruction. The instructions issued by the United States Navy Department in 1898 made no distinction:

"If there are controlling reasons why vessels may not be sent in for adjudication, as unseaworthiness, the existence of infectious disease, or the lack of a prize crew, they may be appraised and sold; and if this cannot be done they may be destroyed. The imminent danger of recapture would justify destruction, if there was no doubt that the vessel was good prize. But, in all such cases, all the papers and other testimony should be sent to the prize court, in order that a decree may be duly entered."²⁷

The destruction of a neutral ship must be clearly distinguished from the destruction of a belligerent ship, even under the principles at present generally accepted. If the belligerent's

²⁷ General Order 492, June 20, 1898, No. 28. Similar instructions were issued by Russia and Japan in 1904, though the Japanese regulations of 1894 applied to "enemy's vessels." See Takahashi, *Int. Law during Chino-Japanese War*, p. 183.

vessel is good prize, it may be lost to that belligerent from the time when his opponent captures it. This is not always and necessarily the case, because it may be recaptured, or a court for some reason may not condemn the vessel. Such vessels may also have neutral cargo, which may be in no way involved in the hostilities. The principle of the Declaration of Paris that "neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag," may be involved in such manner as to make great caution necessary in destroying vessels of the enemy before adjudication. Much greater care should be taken before destroying a neutral vessel itself.

Where a vessel is destroyed, as was said in the British case of *The Leucade*, "the claimants are, as against the captor, entitled to costs and damages."²⁸ By treaty provisions in some instances more severe penalties are prescribed. The question of destruction of vessels before adjudication was brought into prominence in the Russo-Japanese War in 1904, and vigorous protests were made against Russian action in destroying neutral vessels.²⁹ There is much difference of opinion among

²⁸ Spinks, 217.

²⁹ British Parliamentary Papers, Russia, No. 1 (1905); Foreign Relations U. S., 1904, p. 734; Hershey, *Int. Law and Diplomacy during Russo-Japanese War*, p. 136; Lawrence, *War and Neutrality in the Far East*, p. 250; Smith & Sibley, *Int. Law during Russo-Japanese War*, pp. 186, 465; Takahashi, *Int. Law during Russo-Japanese War*, p. 310; *Int. Law Situations*, U. S. Naval War College, 1905, p. 62.

The Russian regulations in regard to destruction were:

"40. In the following and other similar extraordinary cases the commander of the imperial cruiser has the right to burn or sink a detained vessel after having previously taken therefrom the crew, and, as far as possible, all or part of the cargo thereon, as well as all documents and objects that may be essential in elucidating the matter in the prize court:

"(1) When it is impossible to preserve the detained vessel on account of its bad condition.

"(2) When the danger is imminent that the vessel will be recaptured by the enemy.

"(3) When the detained vessel is of extremely little value, and its conduct into port requires too much waste of time and coal.

"(4) When the conducting of the vessel into port appears difficult, owing to the remoteness of the port or a blockade thereof.

"(5) When the conducting of the detained vessel might interfere

writers as to the propriety of the destruction of prize before adjudication.³⁰ This difference of opinion was also evident at the Hague Conference in 1907.

The Declaration of London in 1907 provided:

"Article 48. A captured neutral vessel may not be destroyed by the captor, but must be taken into such port as is proper in order to determine there the rights as regards the validity of the capture."

(b) The same Declaration provided that:

"Article 49. As an exception, a neutral vessel, captured by a belligerent ship, and which would be liable to condemnation, may be destroyed if the observance of article 48 would involve danger to the safety of the ship of war or to the success of the operations in which she is at the time engaged."

To guard against arbitrary destruction of neutral vessels, the Declaration of London also provides that the one who has carried out the destruction must prove the existence of "exceptional necessity" before the question of whether the vessel would be good prize is opened. If he cannot prove "exceptional necessity" he must compensate the parties interested

with the success of the naval war operations of the imperial cruiser or threaten it with danger.

"The officer prepares a memorandum under his signature and that of all the officers concerning the circumstances which have led him to destroy the detained vessel, which memorandum he transmits to the authorities at the earliest possible moment.

"Note.—Although article 21 of the Regulations on Maritime Prizes of 1895 permits a detained vessel to be burned or sunk 'on the personal responsibility of the commander,' nevertheless the latter by no means assumes such responsibility when the detained vessel is actually subject to confiscation as a prize, and the extraordinary circumstances in which the imperial vessel finds itself absolutely demand the destruction of the detained vessel.

"41. If the detained vessel subject to destruction on the basis of the foregoing article is found to be better than the imperial vessel, owing to its condition or its seagoing qualities, the commander has the right to substitute the prize for his own vessel and burn or sink the latter." Foreign Relations U. S., 1904, p. 752.

To these a supplementary order was added on August 5, 1905:

"Russian vessels were not to sink neutral merchantmen with contraband on board in the future, except in case of direct necessity, but in cases of emergency to send prizes into neutral ports."

³⁰ Kleen, 2 La Neutralite, 531.

without further proceedings, as the question of validity of the prize is not, in case of destruction, before the court, unless "exceptional necessity" is first proven.

Even if "exceptional necessity" is proven, the entire question of validity of the capture is still to be settled in the usual manner. If the capture is declared good, no compensation is due the parties interested; if the capture is declared void, the parties interested have full right to compensation.

If innocent neutral goods have been destroyed with a neutral vessel, the owner is entitled to compensation.

(c) Laws and regulations provide for the appropriation before adjudication of vessels captured as prize after they have been properly appraised.³¹

In accordance with article 40 of the Declaration of London:

"The confiscation of the vessel carrying contraband is allowed if the contraband forms, either by value, by weight, by volume, or by freight, more than half the cargo."

In accordance with article 44:

"A vessel stopped because carrying contraband, and not liable to condemnation on account of the proportion of contraband, may, according to circumstances, be allowed to continue her voyage if the master is ready to deliver the contraband to the belligerent ship.

"The delivery of the contraband is to be entered by the captor on the log book of the vessel stopped, and the master of the vessel must furnish the captor duly certified copies of all relevant papers.

"The captor is at liberty to destroy the contraband which is thus delivered to him."

It might happen that the master of a merchant vessel would be unwilling to hand over the contraband on board, and that the commander of the belligerent war ship would not be in

³¹ Perels, *Öffentliche Seerecht*, § 55.

Whenever any captured vessel, arms, munitions, or other material are taken for the use of the United States before it comes into the custody of the prize court, it shall be surveyed, appraised, and inventoried, by persons as competent and impartial as can be obtained, and the survey, appraisal, and inventory shall be sent to the court in which proceedings are to be had. Rev. St. § 4624 (U. S. Comp. St. 1901, p. 3130).

position to take the neutral vessel to port. If in such a case the belligerent can show the "exceptional necessity" which would justify the destruction of the vessel if it were liable to condemnation, he may demand the handing over of the goods liable to condemnation or proceed himself to their destruction. The same liabilities rest upon the belligerent captor as when destroying a neutral vessel. He must first prove "exceptional necessity," failing which he must pay compensation; and, having proved "exceptional necessity," he must then prove the liability of the goods to condemnation, failing which he must pay compensation.³²

(d) Formerly belligerents, under the right of angary, compelled neutral merchant vessels which they had seized to render service for them in transport of troops or otherwise. While this practice has been discontinued, neutral property has been seized for military use, with liability to full indemnity.³³

³² Appendix, p. 580.

³³ Hall, *Int. Law* (5th Ed.) pp. 736-739; 3 *Phillim. Int. Law*, § 29; Bluntschli, § 795 bis. Mr. Hall recites a case of the enforcing of this right upon neutral property passing within neutral territory: "Some English vessels were seized by the German general in command at Rouen, and sunk in the Seine at Duclair, in order to prevent French gunboats from running up the river, and from barring the German corps operating upon its two banks from communication with each other. The German commanders appear to have endeavored in the first instance to make an agreement with the captains of the vessels to sink the latter after payment of their value, and after taking out their cargoes. The captains having refused to enter into any such agreement, their refusal was, by a strange perversion of ideas, 'considered to be an infraction of neutrality,' and the vessels were sunk by the unnecessarily violent method of firing upon them while some, at least, of the members of the crews appear to have been on board. The English government did not dispute the right of the Germans to act in a general sense in the manner which they had adopted; and, notwithstanding the objectionable details of their conduct, it confined itself to a demand that the persons whose property had been destroyed should receive the compensation to which a dispatch of Count Bismarck had already admitted their right. Count Bismarck, on his side, in writing upon the matter, claimed that 'the measure in question, however exceptional in its nature, did not overstep the bounds of international warlike usage.' But he evidently felt that the violence of the methods adopted needed a special justification, for he went on to say: 'The report shows that a pressing danger

The Hague Convention of 1907 provides for the use of neutral railway material in case of necessity, with liability to compensation.³⁴

was at hand, and every other means of meeting it was wanting. The case was, therefore, one of necessity, which even in time of peace may render the employment or destruction of foreign property admissible under the reservation of indemnification."

³⁴ "Article XIX. Railway material coming from the territory of neutral powers, whether it be the property of the said powers or of companies or private persons, and recognizable as such, shall not be requisitioned or utilized by a belligerent except where and to the extent that it is absolutely necessary. It shall be sent back as soon as possible to the country of origin.

"A neutral power may likewise, in case of necessity, retain and utilize to an equal extent material coming from the territory of the belligerent power.

"Compensation shall be paid by one party or the other in proportion to the material used, and to the period of usage."

Rights and Duties of Neutral Powers and Persons in Case of War on Land, Appendix, p. 548.

CHAPTER XXIV.

CONTRABAND.

- 186. Contraband Defined.
- 187. Contraband Classified.
- 188. Liability to Seizure.
- 189. Penalty for Carriage.
- 190. Pre-emption.

CONTRABAND DEFINED.

- 186. Contraband of war may be said to consist of those articles which are of use for war, and which, when bound for a belligerent destination, are liable to capture and confiscation.**

It has been usual for each belligerent to proclaim in public manner what articles will be regarded as liable to seizure, and these are regarded as contraband, "contra bandum."¹ As the idea of neutrality as at present understood was late in development, the word "contraband" was used in domestic law rather than international agreement. The term does not occur in early codes, like "Il Consolato del Mare," though the idea was fairly clear. Grotius does not in 1625 use the name "contraband," though he describes the articles. There is mention of contraband in a treaty between England and Holland in that year. Other proclamations of the same period enumerate "prohibited articles of commerce." Thus there was an attempt of the belligerents to impose restrictions upon the action of other states. The practice led to great diversity in the lists of articles prohibited by the different states, and even by the same state at different times. The action of the Armed Neutrality of 1780 tended to give an international sanction to a list of contraband. From this time the British and continental doctrines in regard to contraband are fairly distinct. The continental doctrine has tended to limit the list broadly to munitions of war, while the British tendency has been toward a more inclusive classification.

¹ 3 Nys, Droit Int. p. 640.

The term "contraband" was used in the Declaration of Paris in 1856, but was not defined. All states were agreed that, in order to render an article liable to capture as contraband, two conditions were essential: (1) That the article might be of use for war; and (2) that it should have an enemy destination. Thus it was necessary that there should be something in the nature of the article and in its destination which would make it of use for warlike purposes. All states were not agreed as to just what articles were of use for war, or as to just what might constitute a hostile destination, and varying opinions upon these points were given in the courts of different states. This uncertainty gave rise to much friction between belligerents and neutrals, and was often the cause of grave inconvenience, great disturbance in insurance rates, and loss of trade.

It is to the interest of the neutral to have as few articles as possible proclaimed contraband, while the belligerent may desire to extend the list. It had been proposed that the states of the world abandon the principle of contraband altogether.² The Conference at The Hague in 1907 was not able to reach

² "With regard to contraband, many most difficult questions arose during the late war. These cases were sufficient to show that the rules with regard to contraband that were developed at the end of the eighteenth and the beginning of the nineteenth centuries are no longer satisfactory for the changed conditions under which both commerce and war are now carried on. His Majesty's government recognize to the full the desirability of freeing neutral commerce to the utmost extent possible from interference by belligerent powers, and they are ready and willing for their part, in lieu of endeavoring to frame new and more satisfactory rules for the prevention of contraband trade in the future, to abandon the principle of contraband of war altogether, thus allowing the oversea trade in neutral vessels between belligerents on the one hand and neutrals on the other to continue during war without any restriction, subject only to its exclusion by blockade from an enemy's port. They are convinced that not only the interest of Great Britain, but the common interest of all nations, will be found, on an unbiased examination of the subject, to be served by the adoption of the course suggested." Sir Edward Grey to Sir Edward Fry, First Plenipotentiary, British Parliamentary Papers, Second Peace Conference at The Hague, 1907, Miscellaneous No. 1 (1908), p. 25.

that conclusion, and the settlement of the question was postponed to a subsequent international conference.

The matter was again taken up for discussion at the International Naval Conference at London in 1908-09 and an agreement was reached by the ten naval powers participating in the conference. By this agreement, as set forth in the Declaration of London, division is made into (1) articles solely of use for war, as armor plates, which may without notice be treated as absolute contraband and become liable to capture if having for their destination a place within the jurisdiction of the enemy; (2) articles of use in war or peace as fuel, which may, without notice, as conditional contraband, be captured, if bound for the enemy's authorities or armed forces; and (3) articles not susceptible of use in war, as agricultural machinery, which are always free from capture. Such an agreement, while not depriving the belligerents of the proper belligerent right to prevent the supply of war material to an enemy, removes from commerce the uncertainties which arose in consequence of the former possibility that either belligerent might arbitrarily declare a list of contraband or add to a list already declared.

CLASSIFICATION OF CONTRABAND.

187. Neutral goods destined for a belligerent may be classified as:

- (a) Absolute contraband, goods particularly of use for war.**
- (b) Conditional contraband, goods of use in war or in peace.**
- (c) Free goods, goods of no use in war.**

The prohibition by one belligerent of the transportation of certain classes of goods to the other belligerent was an early practice. Examples of prohibitions are found as early as the time of Josephus. A proclamation of Edward II in 1315 enumerates prohibited articles in detail. An English proclamation of December 30, 1625, the year of the issue of the great work of Grotius, "*De Jure Belli ad Pacis*," names as articles in which commerce with the enemy is prohibited "any manner of graine, or victualls, or any manner of provisions to serve to build, furnish, or arme any shippes of warr, or any kind of munition for warr, or materials for the same, being not of the nature of

mere merchandize." The lists vary greatly in different periods and under different circumstances.

The Anglo-American and Japanese practice has in general accorded with the classification of Grotius. He enumerates:

"1. Those things which have their sole use in war, such as arms.

"2. Those things which have no use in war, as articles of luxury.

"3. Those things which have use both in war and out of war, as money, provisions, ships, and those things pertaining to ships."³

This may be illustrated by the Japanese order of February 10, 1904:

"The following articles are contraband of war in the Russo-Japanese War:

"1. The following articles are contraband of war when they pass through, or are destined to, the enemy's territory, or to the enemy's army or navy:

"Arms, ammunition, explosives, and materials (including also lead, saltpeter, sulphur, etc.), and machines for manufacturing them, cement, uniforms and equipments for army and navy, armour plates, materials for building ships and their equipments, and all other articles to be used solely for hostile purposes.

"2. The following articles are contraband of war in case they are destined to the enemy's army or navy, or in case they are destined to the enemy's territory, and from the landing place it can be inferred that they are intended for military use:

"Provisions and drinks, clothing and materials for clothing, horses and harness, fodder, wheeled vehicles, coal and other kinds of fuel, timber, currency, gold and silver bullion, and materials for telegraph, telephone, and railroad lines. (The words 'clothing and materials for clothing' and 'other kinds of fuel' were added by Order No. 1 of the Navy Department, of the 38th year of Meiji.)

"3. Of the articles mentioned in the above two clauses, if it is clear from their quality and quantity that they are intend-

³ De Jure Belli ac Pacis, III, 1, 5.

ed for the vessel's own use, such articles shall not be considered contraband of war."⁴

The European continental practice has been to regard goods as contraband or noncontraband according to their nature.

The rules of February 14, 1904, issued by Russia contain a full list of such articles:

"6. The following articles are deemed to be contraband of war:

"(1) Small arms of every kind, and guns, mounted or in sections, as well as armor plates;

"(2) Ammunition for firearms, such as projectiles, shell fuses, bullets, priming, cartridges, cartridge cases, powder, saltpeter, sulphur;

"(3) Explosives and materials for causing explosions, such as torpedoes, dynamite, pyroxyline, various explosive substances, wire conductors, and everything used to explode mines and torpedoes;

"(4) Artillery, engineering, and camp equipment, such as gun carriages, ammunition wagons, boxes or packages of cartridges, field kitchens and forges, instrument wagons, pontoons, bridge trestles, barbed wire, harness, etc.;

"(5) Articles of military equipment and clothing, such as bandoliers, cartridge boxes, knapsacks, straps, cuirasses, intrenching tools, drums, pots and pans, saddles, harness, completed parts of military uniforms, tents, etc.;

"(6) Vessels bound for an enemy's port, even if under a neutral commercial flag, if it is apparent from their construction, interior fittings, and other indications that they have been built for warlike purposes, and are proceeding to an enemy's port in order to be sold or handed over to the enemy;

"(7) Boilers and every kind of naval machinery, mounted or unmounted;

"(8) Every kind of fuel, such as coal, naphtha, alcohol, and other similar materials;

⁴ Takahashi, *Int. Law Russo-Japanese War*, p. 491.

For American and Spanish lists of contraband in 1898, see *Foreign Relations U. S.*, 1898, pp. 775, 782. The Spanish list accords with European practice, while the American list is divided into "absolutely contraband" and "conditionally contraband."

"(9) Articles and materials for the installation of telegraphs, telephones, or for the construction of railroads;

"(10) Generally, everything intended for warfare by sea or land, as well as rice, provisions, and horses, beasts of burden, and other animals, which may be used for a warlike purpose, if they are transported on the account of, or are destined for, the enemy.

"7. The following acts, forbidden to neutrals, are assimilated to contraband of war: The transport of the enemy's troops, of his dispatches and correspondence, the supply of transports and war ships to the enemy. Neutral vessels captured in the act of carrying contraband of this nature may, according to circumstances, be seized and even confiscated."

Under this Russian classification many articles ordinarily regarded as conditional contraband in Anglo-American practice were included in the list of absolute contraband. This action called forth official statements in opposition to such interference with neutral commerce.⁵

⁵ In 1904 there was an exchange of views on the subject of the declaration of Russia between the governments of Great Britain and the United States.

Mr. Choate to Lord Lansdowne:

"American Embassy, London, June 24, 1904.

"My Lord: Referring to our recent interviews, in which you expressed a desire to know the views of my government as to the order issued by the Russian government on the 28th of February last, 'making every kind of fuel, such as coal, naphtha, alcohol, and other similar materials, unconditionally contraband,' I am now able to state them as follows:

"These articles enter into great consumption in the arts of peace, to which they are vitally necessary. They are usually treated not as 'absolutely contraband of war,' like articles that are intended primarily for military purposes in time of war, such as ordnance, arms, ammunition, etc., but rather as 'conditionally contraband'; that is to say, articles that may be used for or converted to the purposes of war or peace according to circumstances. They may rather be classed with provisions and foodstuffs of ordinarily innocent use, but which may become absolutely contraband of war when actually and especially destined for the military and naval forces of the enemy. * * *

The recognition in principle of the treatment of coal and other fuel and raw cotton as absolutely contraband of war might ultimately lead to a total inhibition of the sale by neutrals to the people of belligerent

Instead of the term "conditional contraband," other terms are used, such as "accidental contraband," "occasional contraband," etc. The idea is the same, viz., that the conditions, rather than the nature of the thing itself, determine its liability to capture.

states of all articles which could be finally converted to military uses. Such an extension of the principle, by treating coal and all other fuel and raw cotton as absolutely contraband of war simply because they are shipped by a neutral to a nonblockaded port of a belligerent, would not appear to be in accord with the reasonable and lawful rights of a neutral commerce.

"I shall be glad to receive and transmit to my government the views of His Majesty's government on the same question as soon as your lordship shall have formulated them.

"I have, etc.,

Joseph H. Choate."

Lord Lansdowne replied:

"Foreign Office, July 29, 1904.

"Your Excellency: I have the honor to acknowledge the receipt of your note of the 24th ultimo, containing the views of the United States government with regard to the Russian regulations of the 28th February last, in which every kind of fuel, such as coal, naphtha, alcohol, and other similar materials is declared to be absolutely and unconditionally contraband of war.

"I have the honor to inform your excellency, in reply to your request to be furnished with the views of His Majesty's government on this subject, that the views of the United States government, as expressed in your excellency's note, are generally in accord with those which have been held and acted upon from time to time by His Majesty's government. With reference, however, to the statement made in paragraph 7 as to the attitude of Great Britain in 1870 in regard to coal, I would observe that Her late Majesty's government refused in that year to permit vessels to sail with coal to the French fleet, not merely because they held that the character of the coal depended upon its destination, but because they held that steamers engaged to take out cargoes of coal to the French fleet in the North Sea would be in reality acting as storeships to that fleet.

"It is, however, right that I should add that in the altered conditions of modern maritime warfare and the ever increasing importance of the part played therein by coal, His Majesty's government propose to submit the whole question to careful and exhaustive examination at an early date, with the question of determining whether and in what respects the British rules, as hitherto acted upon, are in need of revision.

"In these circumstances His Majesty's government do not propose to make any formal protest at the present stage against the Russian

From the discussions at the Hague Conference of 1907, and from the opinions of recent writers upon contraband, it was evident that the whole subject of classification of contraband was in a very unsatisfactory state.

The International Naval Conference at London, 1908-09, representing both the Anglo-American and continental

declaration in so far as the question of coal is concerned. They have, however, already entered a protest against the treatment of foodstuffs as absolutely contraband, and they have pointed out that they observe with great concern that rice and provisions will be treated as unconditionally contraband, a step which they regard as inconsistent with the law and practice of nations.

"In that protest it was stated that His Majesty's government does not contest that in particular circumstances provisions may acquire a contraband character, as, for instance, if they should be consigned direct to the army or fleet of a belligerent, or to a port where such fleet may be lying, or if facts should exist raising the presumption that they are about to be employed in victualing the fleet or forces of the enemy. In such cases it is not denied that the other belligerent would be entitled to seize the provisions as contraband of war, on the ground that they would afford material assistance toward the carrying on of warlike operations.

"They could not, however, admit that if such provisions were consigned to the port of a belligerent (even though it should be a port of naval equipment) they must, on that ground alone, be of necessity regarded as contraband of war.

"In the view of His Majesty's government the test appeared to be whether there are circumstances relating to any particular cargo to show that it is destined for military or naval use.

"His Majesty's government further pointed out that the decision of the prize court of the captor in such matters, in order to be binding on neutral states, must be in accordance with recognized rules and principles of international law and procedure.

"They therefore felt themselves bound to reserve their rights by protesting at once against the doctrine that it is for the belligerent to decide that certain articles or classes of articles are, as a matter of course and without reference to the considerations above referred to, to be dealt with as contraband of war regardless of the well-established rights of neutrals; nor would they consider themselves bound to recognize as valid the decision of any prize court which violated these rights, or was otherwise not in conformity with the recognized principles of international law.

"I have, etc.,

Landsdowne."

Foreign Relations U. S., 1904, p. 334.

A communication had been sent by Secretary Hay on June 10, 1904, to the ambassadors of the United States in Europe, containing a full

practice, gave much consideration to the subject of classification of contraband.⁶ The result of the deliberations as embodied in the Declaration of London, 1909, in effect divides goods into three classes: (1) Absolute contraband; (2) conditional contraband; and (3) free goods.

(a) The formulated list of absolute contraband, when destined for a place within enemy jurisdiction, is that which was drawn up at the Second Hague Conference in 1907, and is stated as follows:

"Article 22. The following articles and materials are, without notice, regarded as contraband, under the name of absolute contraband:

"(1) Arms of all kinds, including arms for sporting purposes, and their unassembled distinctive parts.

"(2) Projectiles, charges, and cartridges of all kinds, and their unassembled distinctive parts.

"(3) Powder and explosives specially adapted for use in war.

statement of the attitude of the United States in regard to neutral commerce in articles conditionally contraband of war. *Foreign Relations U. S.*, 1904, p. 3.

Russia later, in response to requests, interpreted a part of article 6 as follows:

"In consequence of doubts which have arisen as to the interpretation of article 6, section 10, of the Regulations Respecting Contraband of War, it has been resolved by the Imperial Government that the articles capable of serving for a warlike object, and not specified in sections 1 to 9 of article 6, as well as rice and foodstuffs, shall be considered as contraband of war, if they are destined for—

"The government of the belligerent power;

"For its administration;

"For its army;

"For its navy;

"For its fortresses;

"For its naval ports; or

"For its purveyors.

"In cases where they are addressed to private individuals these articles shall not be considered as contraband of war.

"In all cases horses and beasts of burden shall be considered as contraband of war."

British Parliamentary Papers, Russia, No. 1 (1905), p. 27.

⁶ British Parliamentary Papers, Miscellaneous No. 5 (1909), Proceedings of the International Naval Conference.

"(4) Gun carriages, caissons, limbers, military wagons, field forges, and their unassembled distinctive parts.

"(5) Clothing and equipment of a distinctively military character.

"(6) All kinds of harness of a distinctively military character.

"(7) Saddle, draught, and pack animals suitable for use in war.

"(8) Articles of camp equipment and their unassembled distinctive part.

"(9) Armor plates.

"(10) Warships and boats and their unassembled parts specially distinctive as only suitable for use in a vessel of war.

"(11) Implements and apparatus made exclusively for the manufacture of munitions of war, for the manufacture or repair of arms or of military material, for use on land or sea."⁷

It is also provided, in order to meet new conditions, that additions to the above list may be made in a regular manner:

"Article 23. Articles and materials which are exclusively used for war may be added to the list of absolute contraband by means of a notified declaration.

"The notification is addressed to the governments of other powers, or to their representatives accredited to the power which makes the declaration. A notification made after the opening of hostilities is addressed only to neutral powers."

(b) A list of conditional contraband, liable to treatment as contraband when destined for the enemy forces or authorities, was agreed upon as follows:

"Article 24. The following articles and materials, susceptible of use in war as well as for purposes of peace, are, without notice, regarded as contraband of war, under the name of 'conditional contraband':

"(1) Foodstuffs.

"(2) Forage and grain suitable for feeding animals.

⁷ There has been much difference of opinion as to the propriety of including "saddle, draught, and pack animals" in the list of absolute contraband. This was shown both at the Hague Conference in 1907 and at the London Conference in 1908-09. The practice of different states in regard to inclusion had also varied.

"(3) Clothing, and fabrics for clothing, and boots and shoes, suitable for military use.

"(4) Gold and silver in coin or bullion; paper money.

"(5) Vehicles of all kinds available for use in war, and their unassembled parts.

"(6) Vessels, craft, and boats of all kinds, floating docks, parts of docks, as also their unassembled parts.

"(7) Fixed railway material and rolling stock, and material for telegraphs, radio-telegraphs, and telephones.

"(8) Balloons and flying machines and their unassembled distinctive parts, as also their accessories, articles and materials distinctive as intended for use in connection with balloons and flying machines.

"(9) Fuel; lubricants.

"(10) Powder and explosives not specially adapted for use in war.

"(11) Barbed wire, as also implements for placing and cutting the same.

"(12) Horseshoes and horseshoeing materials.

"(13) Harness and saddlery materials.

"(14) Binocular glasses, telescopes, chronometers, and all kinds of nautical instruments."

Provision for addition to the list was also made:

"Article 25. Articles and materials susceptible of use in war, as well as for purposes of peace, and other than those enumerated in articles 22 and 24, may be added to the list of conditional contraband by means of a declaration, which must be notified in the manner provided for in the second paragraph of article 23."

A state might also waive its right to treat certain articles as contraband under article 26, if it makes known its intention by a notified declaration in accord with the second paragraph of article 23.

(c) The declaration also provides in article 27 that articles which are not susceptible of use in war may not be declared contraband. It further enumerates a specific free list:

"Article 28. The following are not to be declared contraband of war:

"(1) Raw cotton, wool, silk, jute, flax, hemp, and other raw materials of the textile industries, and yarns of the same.

“(2) Nuts and oil seeds; copra.

“(3) Rubber, resins, gums, and lacs; hops.

“(4) Raw hides and horns, bones, and ivory.

“(5) Natural and artificial manures, including nitrates and phosphates for agricultural purposes.

“(6) Metallic ores.

“(7) Earths, clays, lime, chalk, stone, including marble, bricks, slates, and tiles.

“(8) Chinaware and glass.

“(9) Paper and materials prepared for its manufacture.

“(10) Soap, paint and colours, including articles exclusively used in their manufacture, and varnishes.

“(11) Bleaching powder, soda ash, caustic soda, salt cake, ammonia, sulphate of ammonia, and sulphate of copper.

“(12) Agricultural, mining, textile, and printing machinery.

“(13) Precious stones, semi-precious stones, pearls, mother-of-pearl, and coral.

“(14) Clocks and watches, other than chronometers.

“(15) Fashion and fancy goods.

“(16) Feathers of all kinds, hairs, and bristles.

“(17) Articles of household furniture and decoration; office furniture and accessories.

“Article 29. Neither are the following to be regarded as contraband of war:

“(1) Articles and materials serving exclusively for the care of the sick and wounded. They can, nevertheless, in case of urgent military necessity and subject to the payment of compensation, be requisitioned, if their destination is that specified in article 30.

“(2) Articles and materials intended for the use of the vessel in which they are found, as well as those intended for the use of her crew and passengers during the voyage.”⁸

While previously states have enumerated in treaties what articles they would regard as contraband in case of war between them, the Declaration of London of February 26, 1909, is the first agreement among any considerable number of states upon a full classification. It may be assumed that ten naval

⁸ For full report of proceedings of London Naval Conference, see British Parliamentary Papers, Miscellaneous, Nos. 4 and 5 (1909).

powers would in reaching such an agreement give due weight to their interests both as possible belligerents and as possible neutrals. The placing in a specific free list of certain articles, such as raw cotton, of which a small amount might be used in the manufacture of explosives or for other uses in war, removes the source of great possible disturbances to legitimate trade.

LIABILITY OF CONTRABAND TO SEIZURE.

188. Outside of neutral waters—

- (a) Absolute contraband is liable to seizure, if destined to belligerent territory or to belligerent use.**
- (b) Conditional contraband is liable to seizure, if destined for the military or naval forces of the enemy, or to the authorities of an enemy state, and on board a vessel bound for such destination.**

Any act of war, like the seizure of contraband, would be prohibited in neutral waters. Outside of neutral waters, contraband having an enemy destination is liable to seizure under the neutral flag, which would in ordinary conditions be an evidence of neutral jurisdiction. It was considered that the sale and carriage of war material between neutrals, even in the time of war, was an entirely innocent transaction. That destination was an essential fact in making goods of the nature of contraband liable to seizure was early recognized in practice, treaties, proclamations, etc. A provision in regard to hostile destination was inserted in a treaty between Great Britain and France in 1303, and earlier records show that the destination was as important as the nature of the goods. As was said in a decision of the United States Supreme Court in 1816 in regard to a cargo of provisions: "By the modern law of nations provisions are not, in general, deemed contraband; but they may become so, although the property of a neutral, on account of the particular situation of the war or on account of their destination. If destined for the ordinary use of life in the enemy's country, they are not, in general, contraband; but it is otherwise if destined for military use. Hence, if destined for the army or navy of the enemy, or for his ports of naval or military equipment, they are deemed contraband."⁹

⁹ *The Commercen*, 1 Wheat. 382, 4 L. Ed. 116.

Therefore the destination becomes a deciding factor in determining whether the whole or a part of a cargo on a neutral vessel may be seized. The destination to justify seizure must be such as would be a direct aid to the enemy in prosecuting war.

In general, it was held that there would be sufficient evidence that arms or other absolute contraband bound for the territory of an enemy would directly aid the enemy and that they should therefore be liable to seizure.¹⁰

While in case of provisions or other conditional contraband, which are of use alike to the population at large of the enemy's country and to the military forces, the destination for military use must be established in order to render them liable to seizure.¹¹

The Declaration of London, 1909, endeavored to make more definite the regulations relating to destination.

(a) This Declaration (article 30) makes absolute contraband liable to seizure if it is shown to have a final destination to the territory of the enemy or to his armed forces. This liability exists, regardless of the destination of the vessel upon which the absolute contraband may be found.

(b) By this Declaration conditional contraband is liable to capture, if destined for the armed forces or for a government department of the enemy state, unless the circumstances show that goods destined for a government department of an enemy state cannot be used for the purposes of the war in progress. This exception was introduced to provide for cases where a war is localized. As is said in the report of the International Naval Conference: "For instance, there is a war in Europe, and the colonies of the belligerent countries are not in fact, affected by it. Foodstuffs or other articles in the list of conditional contraband, destined for the use of the civil government of a colony, would not be held to be contraband of war, because the considerations adduced above do not apply to their case. The resources of the civil government cannot be drawn on for the needs of the war. Gold, silver, or paper money

¹⁰ The *Santissima Trinidad*, 7 Wheat. 283, 5 L. Ed. 454.

¹¹ The *Commercen*, 1 Wheat. 382, 4 L. Ed. 116.

are exceptions, because a sum of money can easily be sent from one end of the world to the other.”¹²

Conditional contraband, bound to be discharged in a neutral port, whatever its ultimate destination, is not liable to capture according to the Declaration of London, except in the rare case, when conditional contraband is bound to be discharged at a neutral port with the intent to transport it thence to a belligerent state which has no seaboard. Such a case arose during the South African War in 1900, when vessels carried contraband to the neutral Portuguese port of Lorenzo Marques in Delagoa Bay, thence to be transported overland to the South African forces.¹³

PENALTY FOR CARRYING CONTRABAND.

189. While, in general, contraband is liable to condemnation, the further penalty for the carriage of contraband depends upon the relation of the carrier to the contraband.

(a) The penalties have not been the same in different states. The Anglo-American rules were in general that:

- (1) When the vessel and contraband belonged to different owners, the vessel was liable to loss of freight upon the contraband cargo and to loss of time and expenses during adjudication.**
- (2) When vessel and contraband cargo belonged to the same owner, both might be forfeited.**
- (3) When a part of the vessel belonged to the owner of the contraband cargo, that part might be condemned.**
- (4) Noncontraband goods belonging to the owner of the contraband might be condemned.**
- (5) Fraudulent or other irregular acts might make a vessel carrying contraband liable to penalty.**

(b) The Declaration of London in 1909 provided that:

- (1) When the cargo, reckoned either by value, weight, volume, or freight, forms more than half, the vessel may be condemned.**
- (2) When a vessel carrying contraband is released, she may be condemned to pay costs of prize court proceedings incurred by captor.**

¹² British Parliamentary Papers, Miscellaneous, No. 4 (1909), p. 48.

¹³ *Id.*, Africa, No. 1 (1900).

- (3) Other goods on board belonging to the owner of the contraband may be condemned.
- (4) When a vessel carrying contraband is unaware of the existence of hostilities, or has not since the outbreak of hostilities had opportunity to discharge contraband, the contraband is liable to condemnation only on payment of compensation.
- (5) When the proportion of contraband on a vessel is less than one-half her cargo, she may, when circumstances permit, be allowed to continue her voyage, if the master is willing to hand over the contraband to the belligerent war ship.

The carriage of contraband is not forbidden by international law. Belligerents are, however, permitted by international law to inflict penalties upon neutrals who engage in such commerce as has been prohibited.

The liability to capture begins when a vessel carrying contraband leaves neutral waters, and continues till the contraband is delivered. Liability is sometimes held to continue to the completion of the return voyage, in case of fraud on the outward voyage.¹⁴

Formerly contraband trade was penalized by forfeiture of the vessel and cargo.¹⁵ The carrier is now generally allowed to prove his innocence.

(a) Anglo-American doctrine was to the effect that:

(1) The penalty which in general deters neutral carriers is the loss of freight and the liability to detention.¹⁶

(2) When the vessel and contraband cargo belong to the same person, the ship and cargo are joined in the transaction, the owner cannot plead ignorance, and both ship and cargo are liable to condemnation.

(3) "Where the owner of the cargo has any interest in the ship, the whole of his property will be involved in the same sentence of condemnation; for, where a man is concerned in an illegal transaction, the whole of his property embarked in that transaction is liable to confiscation."¹⁷

¹⁴ The Lucy, 37 Ct. Cl. 97.

¹⁵ The Med Guds Hielp, Pratt, Contraband of War, p. 191a.

¹⁶ The Ringende Jacob, 1 C. Rob. 89.

¹⁷ The Jange Tobias, 1 C. Rob. 329.

(4) The principle which applies to the situation when the owner of the contraband cargo is also owner of the vessel applies when the owner of the contraband cargo is also owner of noncontraband cargo. The noncontraband cargo is liable to be condemned. It is difficult to reconcile the principle that, "to escape from the contagion of contraband, the innocent articles must be property of a different owner,"¹⁸ with the Declaration of Paris, of 1856.

(5) The penalty for fraudulent or other irregular acts in connection with the carriage of contraband may extend to the condemnation of the vessel,¹⁹ or to lesser punishment of fine.²⁰

(b) The Declaration of London, of 1909, while making certain new rules, and reconciling certain differences among maritime states, also revived certain earlier practices, which were found to be consistent with the best interests of belligerents and neutrals.

(1) As a general principle the neutral carrier of contraband is liable to the delay and inconvenience in bringing the contraband cargo before a prize court, and liable to the loss of freight upon the contraband. Experience has shown that, while this may be a sufficient penalty in cases where the contraband carried is of relatively small amount and shipped in the regular course of trade, there may be cases where the carrier of the contraband should be more severely penalized, particularly in cases where the carriage of contraband is not simply an incident in the undertaking, but the main object of a voyage. Opinions differed as to the method of determining what should constitute sufficient evidence to render the carrier liable to a severe penalty. The report of the London Naval Conference says: "It was decided that the contraband must bear a certain proportion to the total cargo. But the question divides itself into two parts: (1) What shall be the proportion? The solution adopted is the mean between those proposed, which varied from a quarter to three quarters. (2) How shall this proportion be reckoned? Must the contraband

¹⁸ *The Staadt Embden*, 1 C. Rob. 26.

¹⁹ *The Franklin*, 3 C. Rob. 217.

²⁰ *The Peterhoff*, 5 Wall. 28, 18 L. Ed. 564.

form more than half the cargo in volume, weight, value, or freight? The adoption of a single fixed standard gives rise to theoretical objections, and also to practices intended to avoid condemnation of the vessel, in spite of the importance of the cargo. If the standard of volume or weight is adopted, the master will ship innocent goods occupying space, or of weight, sufficient to exceed the contraband. A similar remark may be made as regards the standard of value of freight. The consequence is that, in order to justify condemnation, it is enough that the contraband should form more than half the cargo by any one of the above standards. This may seem harsh; but, on the one hand, any other system would make fraudulent calculations easy, and, on the other, the condemnation of the vessel may be said to be justified when the carriage of contraband formed an important part of her venture—a statement which applies to all the cases specified.”²¹

(2) It was recognized that it might be unjust to condemn a vessel carrying an amount of contraband more than one-half its cargo, and to allow a vessel carrying an amount just below one-half its cargo to go free. “A kind of fine was proposed which should bear a relation to the value of the contraband articles. Objections of various sorts were brought forward against this proposal, although the principle of the infliction of some kind of pecuniary loss for the carriage of contraband seemed justified. The same object was attained in another way by providing that the costs and expenses incurred by the captor in respect of the proceedings in the national prize court and of the custody of the vessel and of her cargo during the proceedings are to be paid by the vessel. The expenses of the custody of the vessel include in this case the keep of the captured vessel’s crew. It should be added that the loss to a vessel by being taken to a prize port and kept there is the most serious deterrent as regards the carriage of contraband.”²²

(3) The generally approved rule: “Article 42. Goods which belong to the owner of the contraband and which are

²¹ British Parliamentary Papers, Miscellaneous, No. 4 (1909), p. 51.

²² *Id.*

on board the same vessel are liable to condemnation"—was reaffirmed.

(4) Such penalties should not extend to vessels which are not in intent engaged in carrying contraband, as to vessels which are at sea unaware of the opening of hostilities, or to vessels which have had no opportunity to discharge contraband which they may have on board. At the same time it would not be reasonable to expect the captor to permit such a cargo to go on to his enemy. The provision is therefore made that in such cases the contraband may be condemned subject to payment of compensation (article 43). The innocent shipper and the innocent carrier are thus secured in their rights, while the belligerent rights of the captor are not denied.

(5) Under certain circumstances it might be of advantage to both the neutral carrier of contraband and the belligerent war ship if contraband cargo might be turned over to the belligerent war ship without the necessity of bringing it before a prize court. This might clearly be the case if the contraband on board a large neutral vessel were small in amount. To meet cases where the surrender of the contraband would be advantageous the following article was adopted:

"Article 44. A vessel, stopped because carrying contraband, and not liable to condemnation on account of the proportion of contraband, may, according to circumstances, be allowed to continue her voyage if the master is ready to deliver the contraband to the belligerent ship.

"The delivery of the contraband is to be entered by the captor on the log book of the vessel stopped, and the master of the vessel must give the captor duly certified copies of all relevant papers.

"The captor is at liberty to destroy the contraband which is thus delivered to him."

This is not a new principle. It is contained in numerous treaties. A treaty between the United States and Sweden in 1783 (article 13) provided for the immediate release of a vessel when "the master agrees, consents, and offers" to deliver the contraband to the belligerent commander. Provisions somewhat similar occur in the treaty with Prussia, 1799 (ar-

ticle XIII); Brazil, 1828 (article 18); Columbia, 1846 (article 19); Bolivia, 1858 (article 19); Haiti, 1864 (article 23); and in other treaties. Some of these treaties provide that, if the cargo cannot be received on board the belligerent vessel, the neutral vessel must be sent to a prize court. As in any case the goods, whether sent in or destroyed, may be made the subject of prize court proceedings, it would seem in fact to make little difference what disposition the belligerent might make of them after they were handed over to him. The belligerent may therefore take the articles to port, use the articles, or, if their preservation unduly hampers his movements, he may destroy them. The responsibility of the neutral master ceases from the time when he has delivered the contraband to the belligerent commander. If the neutral master denies the contraband nature of goods of which the surrender is requested by the belligerent, the neutral master may hand them over, and if the court finds the master's contention correct the master may obtain compensation.

PRE-EMPTION.

190. Under the doctrine of pre-emption, goods of the nature of conditional contraband have sometimes been intercepted by a belligerent when bound for an enemy destination and paid for with a fair profit.

"In strictness, every article which is either necessarily contraband, or which has become so from the special circumstances of the war, is liable to confiscation; but it is usual for those nations who vary their list of contraband to subject the latter class to pre-emption only, which by the English practice means purchase of the merchandise at its mercantile value, together with a reasonable profit, usually calculated at ten per cent. on the amount. This mitigation of extreme belligerent privilege is also introduced in the case of products native to the exporting country, even when they are affected by an inseparable taint of contraband."²³

States not favorable to the doctrine of conditional contraband have admitted the doctrine of pre-emption. The rules

²³ Hall, Int. Law (5th Ed.) p. 665.

of the Institute of International Law adopted in 1896 provided for pre-emption, while declaring the abolition of conditional contraband.²⁴

²⁴ "§ 4. Sont et demeurent abolies les prétendues contrebandes désignées sous les noms soit de contrebande relative, concernant des articles (*usus ancipitis*) susceptibles d'être utilisés par un belligérant dans un but militaire, mais dont l'usage est essentiellement pacifique, soit de contrebande accidentelle, quand les dits articles ne servent spécialement aux buts militaires que dans une circonstance particulière.

"§ 5. Néanmoins le belligérant a, à son choix et à charge d'une équitable indemnité, le droit de séquestre ou de préemption quant aux objets qui, en chemin vers un port de son adversaire, peuvent également servir à l'usage de la guerre et à des usages pacifiques."

XV Annuaire, 230.

CHAPTER XXV.

BLOCKADE.

191. Blockade Defined.
192. Places That may be Blockaded.
193. Establishment of a Blockade.
194. Notification.
195. Vessels in Blockaded Port.
196. Maintenance.
197. Termination.
198. Violation.
199. Penalty for Violation.
200. Period of Liability for Violation.

BLOCKADE DEFINED.

- 191. Blockade is a measure of war by which the forces of one belligerent obstruct communication with a place or port of the enemy, and is, in general, applied to the prevention of communication by water.**

Blockade is a measure of war aimed at an enemy, though to a large degree affecting neutrals.

"Blockade is to close an enemy's port, bay, or coast with force."¹ The object of blockade is to cut off trade and other communication with the enemy. Blockade is not usually established with a view to the destruction or surrender of the place. The blockading forces are usually at such a distance from the place blockaded as not to imperil its physical safety, and they are seeking rather to bring pressure upon the place by preventing access and egress than to injure the place or its inhabitants by shot and shell.

Blockade is a war right, and exists in time of civil war as in the time of war between states. Pacific blockade, so called, as affecting third states, is not now regarded with favor.² Blockade by insurgents is not permitted, as the insurgents,

¹ Japanese Regulations Governing Captures at Sea, March 7, 1904, art. 21.

² Ante, p. 235.

until recognized as belligerents, have no war rights upon the sea against foreign states, have no responsible prize courts, and no international status which will entitle them to exercise the right of blockade.³

Blockades are sometimes distinguished as commercial or as military or strategic. The commercial blockade is regarded as aimed to cut off intercourse between the coast and the world at large, while the military or strategic is aimed to cut off the military forces from communication by sea. Both are at present regarded as equally legitimate, though the abolition of commercial blockade has been advocated.⁴

PLACES THAT MAY BE BLOCKADED.

192. Blockade is not confined to a seaport, but may extend to any avenue of communication wholly within the jurisdiction of the enemy, such as a river, gulf, bay, etc., or a portion of the enemy coast.

A blockade aims to cut off communication between the enemy and the outside world. It is legitimate to close any avenue of communication which is wholly within enemy jurisdiction, as ports, bays, rivers, or coasts.⁵

There may be, however, waterways which furnish access to the enemy which are partly within neutral jurisdiction. It is generally held that straits connecting the open seas are not liable to blockade, even though both shores may be within

³ Letter of Secretary Hay to Secretary of Navy, Nov. 15, 1902; *In re Prize Cases*, 2 Black, 635, 17 L. Ed. 459.

⁴ "To forbid all neutral commerce, when no immediate military end is to be served, and when the effect of the measure upon the ultimate issue of the war is so slight as usually to be almost inappreciable, is to contradict in the plainest manner the elementary principle that neutrals have a right, as a general rule, to trade with the enemy. If this principle can be invaded, in order that a belligerent may be subjected to a mere incidental annoyance, it is for all practical purposes nonexistent." Hall, *Int. Law* (5th Ed.) 632.

⁵ The blockade declared by President McKinley on April 22, 1898, extended to "the north coast of Cuba, including all ports on said coast between Cardenas and Bahia Honda, and the port of Cienfuegos on the south coast of Cuba." *Foreign Relations U. S.* 1898, p.

enemy jurisdiction. A river flowing between a neutral and a belligerent state may not be closed by blockade, though, of course, a belligerent may invest the enemy towns along the river and exercise war rights within belligerent jurisdiction.⁶ When a river flows through neutral states and belligerent states, and its outlet is in a neutral state, its outlet may not be blockaded. When the outlet is, however, within belligerent jurisdiction, there is much diversity of opinion as to the right of blockade. Some claim that the neutral riparian states have the right to free navigation, even in time of war. Others claim that the belligerent has full right to blockade the mouth of any river, where both banks are enemy territory. Practice has varied. The Danube was blockaded in 1854. France refrained from blockading the Ems in 1870, because it would injure Holland, a neutral. Russia closed the Danube to commerce in 1877. Treaties have been made by which certain powers have agreed not to blockade certain rivers, as the convention in regard to the Rhine in 1831, and the treaty in regard to the Parana and Uruguay rivers in 1853.⁷ It seems, from practice and from the fact of treaty agreement, that it is not contrary to the principles of international law to blockade a river which, though traversing neutral territory, discharges within belligerent territory. Probably expediency would have a large influence. If the neutral interests along the river were large and the belligerent small, blockade would not be established hastily; while if the reverse were the case, probably the belligerent would feel justified in establishing a blockade.⁸

The status of canals in time of war is usually determined by treaty agreement. Blockade of the Suez and Panama canals is prohibited by treaty.

⁶ The *Peterhoff*, 5 Wall. 54, 18 L. Ed. 564.

⁷ "If it should happen (which God forbid) that war should break out between any of the states, republics or provinces of the River Plate or its confluent, the navigation of the Rivers Paraná and Uruguay shall remain free to the merchant flag of all nations, excepting in what may relate to munitions of war, such as arms of all kinds, gunpowder, lead and cannon balls." Article VI, Treaty between United States and Argentine Republic, July 10, 1853. Other states are also parties to this treaty.

⁸ Fauchille, *Du Blocus Maritime*, p. 172.

The Declaration of London, 1909, enunciates the general principles:

"Article I. A blockade must be limited to the ports and coasts belonging to or occupied by the enemy."

"Article 18. The blockading forces must not bar access to ports or to the coasts of neutrals."

ESTABLISHMENT OF A BLOCKADE.

193. Blockade may be established—

- (a) **By the authority of the senior officer in the area of military operations as a step in the prosecution of those operations, a de facto blockade.**
- (b) **Or more frequently by formal proclamation by the government, a public blockade.**

(a) It may be necessary for the senior officer in the area of hostilities to act without consulting the central government, particularly if he is at a great distance from or in a place where communication is not easy with his superiors. The senior officer is sometimes clothed with authority to establish a blockade. It is in general held that de facto blockades must, so soon as known to the central government, receive its sanction. There is a difference of opinion in regard to blockades. The continental writers usually maintain that establishment by the central government is essential to bring the laws of blockade into operation. American, English, and Japanese opinion does not regard such action as necessary.

"Blockades are divided by English and American (and Japanese) publicists, into two kinds: (1) A simple, or de facto, blockade; and (2) a public, or governmental, blockade. This is by no means a mere nominal distinction, but one that leads to practical consequences of much importance. In cases of capture, the rules of evidence which are applicable to one kind of blockade are entirely inapplicable to the other; and what a neutral vessel might lawfully do in case of a simple blockade would be sufficient cause for condemnation in case of a governmental blockade. A simple, or de facto, blockade is constituted merely by the fact of an investment, and without any necessity of a public notification. As it arises solely from

facts, it ceases when they terminate. Its existence must, therefore, in all cases, be established by clear and decisive evidence. The burthen of proof is thrown upon the captors, and they are bound to show that there was an actual blockade at the time of the capture. If the blockading ships were absent from their stations at the time the alleged breach occurred, the captors must prove that it was accidental, and not such an absence as would dissolve the blockade.

(b) "A public, or governmental, blockade is one where the investment is not only actually established, but where also a public notification of the fact is made to neutral powers by the government, or officers of state, declaring the blockade. Such notice to a neutral state is presumed to extend to all its subjects; and a blockade established by public edict is presumed to continue till a public notification of its expiration. Hence the burthen of proof is changed, and the captured party is now bound to repel the legal presumptions against him by unequivocal evidence. It would, probably, not be sufficient for the neutral claimant to prove that the blockading squadron was absent, and there was no actual investment at the time the alleged breach took place. He must also prove that it was not an accidental and temporary absence, occasioned by storms, but that it arose from causes which, by their necessary and legal operation, raised the blockade."⁹

⁹ 2 Halleck, Int. Law (4th Ed.) p. 218.

In the case of *The Olinde Rodrigues*, 174 U. S. 510, 19 Sup. Ct. 851, 43 L. Ed. 1065, the United States Supreme Court said:

"This country has always recognized the essential difference between a military and a commercial blockade. The one deals with the exclusion of trade, and the other involves the consideration of armed conflict with the belligerent. The necessity of a greater blockading force in the latter case than in the former is obvious. The difference is in kind, and in degree.

"Our government was originally of opinion that commercial blockades in respect of neutral powers ought to be done away with; but that view was not accepted, and during the period of the Civil War the largest commercial blockade ever known was established."

DECLARATION AND NOTIFICATION OF BLOCKADE.

194. In order to incur liability for its breach, a neutral must have knowledge of the existence of a blockade. This knowledge may be communicated:

- (a) By public declaration and notification, announcing the conditions of the establishment of the blockade.**
- (b) By notifying vessels when they approach the place blockaded.**

It is universally held that, to be binding, a blockade must be known. There is, however, difference of opinion as to what constitutes knowledge which will render a neutral vessel liable to penalty.

(a) The Declaration of London, 1909, makes provision as to what points must be specified in a declaration of blockade:

"Article 9. A declaration of blockade is made either by the blockading power or by the naval authorities acting in its name.

"It specifies—

"(1) The date when the blockade begins.

"(2) The geographical limits of the coast blockaded.

"(3) The delay to be allowed to neutral vessels for departure."

And also that the declaration of blockade must be officially notified:

"Article 11. A declaration of blockade is notified—

"(1) To neutral powers, by the blockading power, by means of a communication addressed to the governments themselves, or to their representatives accredited to it.

"(2) To the local authorities, by the officer commanding the blockading force. These authorities will, on their part inform as soon as possible the foreign consuls who exercise their functions in the port or on the coast blockaded."

The provisions of this article 11 make necessary two notifications. Notification to the neutral states has been customary. Notification to the local authorities is necessary, in order that neutrals at the time within the blockaded area may have knowledge of the blockade and become liable in case of violation. The responsibility for making known to the neutrals

the existence of the blockade is placed upon the local authorities of the blockaded belligerent. A neutral vessel coming out of a blockaded port cannot, in general, plead ignorance of the blockade if the local authorities have been notified before she sailed. The blockading commander cannot hold a neutral vessel liable for information which he has not given: e. g., if the commander has not specified how many days will be allowed for neutral vessels to leave port, it is assumed that he did not intend to place a limit upon such departure, and the vessels are allowed to pass free. If, however, the neglect to communicate the conditions of the blockade rests upon the local authorities, ignorance on the part of neutral vessels leaving the port will not affect the liability of vessels as regards the blockading force.

The American, British, and Japanese practice had assumed that a neutral vessel, leaving port after its government had been officially notified, had knowledge of the blockade and was liable to penalty. The United States position was as follows:

"Neutral vessels are entitled to notification of a blockade before they can be made prize for its attempted violation. The character of this notification is not material. It may be actual, as by a vessel of the blockading force, or constructive, as by a proclamation of the government maintaining the blockade, or by common notoriety. If a neutral vessel can be shown to have had notice of the blockade in any way, she is good prize, and should be sent in for adjudication; but, should formal notice not have been given, the rule of constructive knowledge arising from notoriety should be construed in a manner liberal to the neutral."¹⁰

The Declaration of London, 1909, announces:

"Article 15. Failing proof to the contrary, knowledge of the blockade is presumed if the vessel left a neutral port subsequently to the notification of the blockade made in sufficient time to the power to which such port belongs."

(b) In case of *de facto* blockades, and in cases where there is reasonable doubt as to the knowledge of the existence of the blockade on the part of the neutral vessel, the vessel is

¹⁰ General Order 492, Navy Department, June 20, 1898, No. 3, Foreign Relations U. S. 1898, p. 780.

entitled to notification by a vessel before the blockaded port.¹¹ Such notification should be entered on the ship's log, with the officer's official signature.

The continental practice was to give public notification of the blockade to neutral states as an act of international courtesy, in order that undue hardship to neutral commerce may so far as possible be prevented, and also to notify a neutral vessel as it approaches the blockaded place.

VESSELS IN THE BLOCKADED PORT.

195. Neutral vessels in a blockaded port when a blockade is established are, by general usage, allowed to discharge and load cargo and to depart within a specified time.

Vessels within a neutral port at the establishment of a blockade were formerly presumed to be notified.¹² The Declaration of London, 1909 (article 9), provides that, in order that neutral vessels in port at the establishment of a blockade may be liable to condemnation for breach of blockade on leaving the port, there must be in the notified declaration a state-

¹¹ Id. Nos. 4, 5; Declaration of London, 1909, art. 16.

"When the commanding officer of a squadron or a man of war declares a blockade, he shall take the following steps:

"1. He shall report the declaration of the blockade to the minister of the navy.

"2. He shall report the declaration of the blockade to every Japanese minister residing in the countries near the blockaded area, and shall request him to inform the government of the country and all the foreign ministers and consuls residing in the country to which he is accredited of the establishment of the blockade.

"3. He shall communicate the declaration of the blockade to all the foreign consuls residing in neutral districts in the neighborhood of the blockaded area, and shall take any other measures necessary to make known the fact of the blockade.

"4. He shall inform as far as possible, by means of a flag of truce, the proper officers and consuls of neutral countries residing within the blockaded area, of the declaration of the blockade."

Article 24, Japanese Regulations Governing Captures at Sea, March 7, 1904.

The *Johanna Maria*, Spinks, 307.

¹² In re Prize Cases, 2 Black, 635, 17 L. Ed. 459.

ment of the period within which neutral vessels may depart; otherwise (article 16) they are free to depart at any time.

The practice of allowing neutral vessels to withdraw from a blockaded port is comparatively modern. The period allowed has usually been fifteen days, but this has not been uniform. The United States proclamations in the Spanish-American War in 1898 stated that "neutral vessels lying in any of said ports at the time of the establishment of such blockade will be allowed thirty days to issue therefrom."¹³ It is now understood that neutral vessels should be allowed a reasonable time to depart from a blockaded port. The period thus allowed will depend upon the circumstances in each case.

MAINTENANCE OF A BLOCKADE.

196. By the Declaration of Paris, of 1856, it was set forth that "blockades, in order to be binding, must be effective; that is to say, maintained by a force sufficient to prohibit access to the coast of the enemy."¹⁴

This definition of an effective blockade was generally accepted in order to put an end to paper blockades of the earlier part of the nineteenth century. It is manifest, with the present development of means of communication, that strict maintenance of such a blockade would be impossible.¹⁵ The declaration has therefore been interpreted in a liberal spirit. On the continent the interpretation has been more strict than else-

¹³ Foreign Relations U. S. 1898, pp. 769, 773.

¹⁴ "Art. 4. Les blocus pour être obligatoires, doivent être effectifs, c'est à dire maintenus par une force suffisante pour interdire l'accès du littoral ennemi."

¹⁵ "A blockade to be effective need not be perfect. It is not necessary that the beleaguered port should be hermetically sealed. It is not enough to make the blockade ineffective that on some particularly stormy night a blockade runner slid through the blockading squadron. Nor is it enough that through some exceptional and rare negligence of the officers of one of the blockading vessels a blockade runner was allowed to pass when perfect vigilance could have arrested him. But if the blockade is not in the main effective—if it can be easily eluded—if escaping its toils is due not to casus or some rare and exceptional negligence, but to a general laxity or want of efficiency—then such blockade is not valid."

Wharton, Commentaries American Law, § 233.

where. A decision of the United States Supreme Court in 1899 contains the following:

"To be binding, the blockade must be known, and the blockading force must be present; but is there any rule of law determining that the presence of a particular force is essential in order to render a blockade effective? We do not think so, but, on the contrary, that the test is whether the blockade is practically effective, and that that is a question, though a mixed one, more of fact than of law.

"The fourth maxim of the Declaration of Paris (April 16, 1856) was: 'Blockades, in order to be binding, must be effective; that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.' Manifestly this broad definition was not intended to be literally applied. The object was to correct the abuse, in the early part of the century, of paper blockades, where extensive coasts were put under blockade by proclamation, without the presence of any force, or an inadequate force; and the question of what might be sufficient force was necessarily left to be determined according to the particular circumstances. * * *

"As we hold that an effective blockade is a blockade so effective as to make it dangerous in fact for vessels to attempt to enter the blockaded port, it follows that the question of effectiveness is not controlled by the number of the blockading force. In other words, the position cannot be maintained that one modern cruiser, though sufficient in fact, is not sufficient as matter of law."¹⁶

This decision of the United States Supreme Court seems to be most reasonable, and is in effect in full accord with the conclusions of the International Naval Conference of 1908-09, as shown in articles 2 and 3 of the Declaration of London and in the report upon these articles.¹⁷

¹⁶ The *Olinde Rodrigues*, 174 U. S. 510, 19 Sup. Ct. 851, 43 L. Ed. 1065.

An English opinion states that: "In the eye of the law a blockade is effective if the enemies' ships are in such numbers and position as to render the running of the blockade a matter of danger, although some vessels may succeed in getting through." *Geipel v. Smith*, L. R. 7 Q. B. 404.

¹⁷ British Parliamentary Papers, Miscellaneous No. 4 (1909) p. 36.

Questions have been raised as to the meaning of the words "sufficient force." Shore batteries commanding the approach to the blockaded port, supported by a naval force, have been considered "sufficient."¹⁸ The sinking of vessels laden with stone or similar obstructions in a part of the harbor mouth or in a part of the outlets has been allowed as auxiliary to blockade.¹⁹ There was considerable discussion at the Hague Conference in 1907 as to the use of submarine mines for the purpose of blockade. No definite conclusion was reached beyond that of article II of the Convention Relative to the Laying of Submarine Automatic Contact Mines: "It is forbidden to lay automatic contact mines off the coast and ports of the enemy, with the sole object of intercepting commercial shipping."²⁰ This limitation would not usually be specially burdensome, as the use of mines for the "sole object of intercepting commercial shipping" would not be common, and intent is difficult to prove.

The United States announced in 1898 the simple proposition that "a blockade, to be effective and binding, must be maintained by a force sufficient to render ingress to or egress from the port dangerous."²¹

TERMINATION OF A BLOCKADE.

197. A blockade ceases:

- (a) On the conclusion of peace.
- (b) When the blockading vessels voluntarily withdraw.
- (c) When these vessels are driven away by the enemy, however short the time of absence.
- (d) When it ceases to be effective, except because of stress of weather.
- (e) When the blockaded place comes into possession of the forces of the blockading belligerent.

(a) As blockade is a measure of war, it comes to an end when peace is restored. An armistice or suspension of hostili-

¹⁸ The Circassian, 2 Wall. 135, 17 L. Ed. 796.

¹⁹ U. S. Dip. Correspondence 1862, pp. 36, 316; Foreign Relations U. S. 1884, pp. 66, 96; Id. 1886, p. 95; Id. 1894, Appendix I, p. 71.

²⁰ Scott, Hague Conferences, p. 253.

²¹ Foreign Relations U. S. 1898, p. 780.

ties does not terminate a blockade, or even suspend it, as neutrals are not bound by the armistice, and might during the suspension commit those acts which the blockade exists to prevent.

(b) When the blockading force voluntarily withdraws, the blockade is said to be raised, and it is customary for the blockading belligerent to notify neutrals of this fact, as of the establishment of a blockade. Such notification was made obligatory by article 13 of the Declaration of London.

(c) When the blockading vessels are driven away by the enemy, the blockade is effectively broken, and can only be renewed in the same manner as it was originally established.

(d) As, in general, "a blockade, to be binding, must be effective," it comes to an end when it ceases to be effective.

It is generally held that the temporary absence of the whole or a part of the blockading force on account of the stress of weather does not put an end to the blockade, as the same stress would affect the vessels attempting to pass the blockade.

There was a difference of opinion as to the temporary absence of blockading forces in pursuit of a vessel which has run the blockade. The English and American opinion was to the effect that temporary absence for blockading purposes does not raise the blockade, though a neutral vessel, entering or leaving at such time, does not incur penalty.

The United States instructions issued to blockading vessels in 1898 state that:

"A blockade, to be effective and binding, must be maintained by a force sufficient to render ingress to or egress from the port dangerous. If the blockading vessels be driven away by stress of weather, but return without delay to their stations, the continuity of the blockade is not thereby broken; but if they leave their stations voluntarily, except for purposes of the blockade, such as chasing a blockade runner, or are driven away by the enemy's force, the blockade is abandoned or broken. As the suspension of a blockade is a serious matter, involving a new notification, commanding officers will exercise especial care not to give grounds for complaints on this score."²²

²² *Id.*

The Declaration of London (article 4) is to the effect that the blockade would be regarded as raised, and must be again declared and notified, if the forces are withdrawn for any reason other than because of stress of weather.

When, after the time specified in the proclamation, vessels, other than public vessels of a neutral or vessels in distress, are allowed to pass a blockade, it is generally held to be no longer effective.²³

(e) As blockade would no longer be necessary when the belligerent obtained possession of the blockaded place, it is considered that actual occupation of the place supersedes and puts an end to the blockade.²⁴

VIOLATION OF BLOCKADE.

198. The actual passing or the attempt to pass a blockade is regarded as a violation of blockade.

It is generally held that the actual unallowed passing of a blockade constitutes a violation.

The doctrine of the French and Italian courts, and continental opinion in general, is that an actual attempt to pass the line of blockading forces before the place blockaded is necessary, in order to create a breach of blockade.

The American,²⁵ English,²⁶ and Japanese²⁷ courts have held

²³ *The Franciska*, Spinks, 287; *The Johanna Maria*, Spinks, 307.

²⁴ *The Circassian*, 2 Wall. 135, 17 L. Ed. 796; *The Adula*, 176 U. S. 361, 20 Sup. Ct. 432, 44 L. Ed. 505.

²⁵ *The Adula*, 176 U. S. 361, 20 Sup. Ct. 432, 44 L. Ed. 505; *Yeaton v. Fry*, 5 Cranch, 335, 3 L. Ed. 117; *The Circassian*, 2 Wall. 135, 17 L. Ed. 796.

²⁶ *The Frederick Molke*, 1 C. Rob. 86; *The Columbia*, 1 C. Rob. 130; *The Neptunus*, 2 C. Rob. 110.

²⁷ "Any vessel which has received notification of a blockade shall be considered to have violated the blockade inward in the following cases:

"1. When such vessel has passed into the blockaded area, or has attempted to do so.

"2. When such vessel, lying in the neighborhood of the blockaded area, is considered to be steering into the area, no matter what port of destination is mentioned in the ship's papers.

"3. When such vessel has transported or attempted to transport

that the attempt to pass begins at the time when the vessel leaves neutral waters bound for the place blockaded.

The Declaration of London, 1909 (article 17), attempted to reconcile the differences of opinion by prescribing the area within which neutral vessels might be captured for violation of blockade, viz.: "Within the radius of action of the ships of war assigned to maintain an effective blockade." Under this regulation a neutral vessel leaving a neutral port would not be liable for intent to break a blockade until she had come within the zone within which the blockading forces were operating. The determination of this zone will be considered more at length under section 200, pages 454-458.

In the following cases it is generally held that there is no violation of blockade by egress: (1) When a vessel passes out under official permit; (2) when a vessel which has innocently entered a port passes out in ballast, or without discharging or loading cargo; (3) when a vessel in port at beginning of blockade passes out in ballast; or (4) when a vessel sails out with innocent cargo loaded before the blockade was declared. In the following cases ingress is not considered a violation: (1) When a vessel has official permission to enter; (2) when a vessel enters under stress of weather, because of lack of provisions, or from other absolute necessity; or (3) when a vessel sails for a blockaded port, anticipating in good faith the termination of the blockade, and intending to go to another port in case the blockade continues.

The permitted passing of blockade by public neutral vessels is not a violation of blockade. This may be forbidden, but is usually regulated,²⁸ but regulations should always be impartial.

cargo to a blockaded place, by transshipping to another vessel outside of the blockaded area in order that the latter may pass the line of blockade.

"4. When such vessel is bound for the blockaded port."

Article XXIX, Japanese Regulations Governing Captures at Sea, March 7, 1904.

²⁸ During the Spanish-American War of 1898 the following was accepted as appropriate procedure:

"1. That a prerequisite of the entrance of a neutral vessel of war into a blockaded port, unless in a case of exceptional urgency, should be the consent of the government establishing the blockade, obtained through the usual diplomatic channels.

"2. The approach of the blockaded port in such a manner that the

PENALTY FOR THE VIOLATION OF BLOCKADE.

199. The penalty for the violation of blockade may be the forfeiture of vessel and cargo, or, in certain cases, the forfeiture of the vessel only.

The violation of a blockade is an offense against the blockading state, and not usually against the law of the neutral state. The penalty is therefore liability of the vessel and cargo to capture and condemnation. The vessel, as the means of violation, is always liable to penalty, and when vessel and cargo belong to same owner both are liable. The cargo may be proven innocent, and may be released. This may be the case when vessel and cargo belong to different owners, and the owner of the innocent cargo has no intent to violate the blockade.²⁹

senior officer of the blockading squadron would recognize with certainty upon the appearance of a neutral vessel in the blockaded belt her identity with the war vessel of whose coming he had been notified.

"3. In such exceptional cases as prevent permission being previously obtained through the usual diplomatic channels, the decision to rest with the senior officer present of the blockading squadron.

"4. No special formalities in connection with the departure of neutral vessels of war from a blockaded port are requisite, other than may be necessary to identify the vessel leaving the port as a neutral, the arrangements concerning the same to be agreed upon between the commanding officer of the blockading squadron and the commanding officer of the vessel in the blockaded port." *Foreign Relations U. S.* 1898, p. 1168.

²⁹ 2 Halleck, *Int. Law* (4th Ed.) 237; *Declaration of London*, art. 21, Appendix, p. 576.

LIABILITY FOR VIOLATION OF BLOCKADE.

200. (a) By American, English, and Japanese opinion:

(1) In case of violation of blockade by egress, the vessel was generally held to be in delicto until she has completed her voyage.

(2) A vessel bound for a blockaded port is regarded as in delicto from the time she leaves neutral waters until she returns to her home port.

(b) By continental European opinion neutral vessels were held to be in delicto only when attempting to pass the blockade and during continuous pursuit from the line of blockade by a blockading vessel until they reached a neutral port.

(c) By the Declaration of London, 1909:

"Article 17. The seizure of neutral vessels for violation of blockade may be made only within the radius of action of the ships of war assigned to maintain an effective blockade.

"Article 20. A vessel which in violation of blockade has left a blockaded port or has attempted to enter the port is liable to capture so long as she is pursued by a ship of the blockading force. If the pursuit is abandoned, or if the blockade is raised, her capture can no longer be effected."

(a) (1) The English opinion,³⁰ extending the liability to capture for violation of blockade throughout the voyage, seems to be based on a Dutch Ordinance of 1630.³¹ This was regarded at the time as augmenting unduly belligerent rights, and was abandoned by most other states.³²

(2) During the early period the American tendency was to follow the continental rather than the English opinion.³³ In 1898, however, as in the Civil War, the United States gave clear enunciation to the English doctrine: "The liability of a blockade runner to capture and condemnation begins and terminates with her voyage. If there is good evidence that she sailed with intent to evade the blockade, she is good prize

³⁰ The *Frederick Molke*, 1 C. Rob. 86; The *Welvaart van Pillaw*, 2 C. Rob. 128; The *General Hamilton*, 6 C. Rob. 61.

³¹ Robinson, *Collectanea Maritima*, 165.

³² 1 Kleen, *La Neutralité*, 638.

³³ American State Papers, 2 Foreign Relations (1797) 154.

from the moment she appears upon the high seas. Similarly, if she has succeeded in escaping from a blockaded port, she is liable to capture at any time before she reaches her home port. But with the termination of the voyage the offense ends."³⁴

The Japanese regulations of 1904 embody the same principles, while the Russian regulations conform to the continental opinion.³⁵

It is also held that a vessel remote from and having no connection with the blockade may capture a vessel which has violated a blockade.³⁶ The position taken by the United States, Great Britain, and Japan has received much unfavorable criticism.³⁷

There is also considerable difference of opinion as to what constitutes a voyage and when the voyage is complete. In case of tramp steamers having neutral registry, there are many instances where the return to a home port is a rare occurrence, and where voyages are not, as in earlier days, out to and back from a certain port. Before returning to the home port, such steamers may go to ports far more remote, and in some instances may not for a long period, if ever, return to the so-called home port.

(b) The continental doctrine works less hardship upon the neutral, and if the Declaration of Paris, that blockade, to be binding, must be effective, is to be fairly and strictly inter-

³⁴ Foreign Relations U. S. 1898, p. 781.

³⁵ "Art. 11. Merchant vessels of neutral nationality are subject to confiscation as prizes in the following cases: * * * (2) When the vessels are caught violating a blockade, and it is not proven that the establishment of the blockade remained unknown to the masters."

For the enforcement of this law the instructions provided:

"37. Vessels subject to detention are the following: * * * (2) Neutral merchant vessels. * * * (c) If they are caught violating an actual and declared blockade."

³⁶ "Any public vessel of the belligerent, whose rights had been violated, may be the agent or minister to apprehend the offender, though, by dexterity or superior speed, the culpable actor may escape arrest at the time or place of the perpetration of the wrong." The *Memphis*, Blatchf. Prize Cas. 260, Fed. Cas. No. 9,413.

³⁷ 1 Kleen, *La Neutralité*, 638; 8 Pradier-Fodéré, *Droit Int. Public*, § 3143; Gessner, *Le Droit des Neutres sur Mer*, 214; Fauchille, *Du Blocus Maritime*, 354.

puted, it may be maintained that the liability to capture for violation of blockade should be confined to the field of effective operations, which would include the limit of continuous pursuit.³⁸

(c) The International Naval Conference at London, in 1909, found wide differences of opinion existing among the naval powers.³⁹ Finally, the following rule was adopted, becoming article 17 of the Declaration of London:

"The seizure of neutral vessels for violation of blockade may be made only within the radius of action of the ships of war assigned to maintain an effective blockade."

As to what constitutes a "radius of action," there is an explanation given in the official report. This is of such importance in its bearing on maritime hostilities that it is given in full:

"When a government decides to undertake blockading operations against some part of the enemy coast, it details a certain number of warships to take part in the blockade, and intrusts the command to an officer, whose duty is to use them for the purpose of making the blockade effective. The commander of the naval force thus formed posts the ships at his disposal according to the line of the coast and the geographical position of the blockaded places, and instructs each ship as to the part which she has to play, and especially as to the zone which she is to watch. All the zones watched, taken together and so organized as to make the blockade effective, form the area of operations of the blockading naval force.

"The area of operations so constituted is intimately connected with the effectiveness of the blockade, and also with the number of ships employed on it.

"Cases may occur in which a single ship will be enough to keep a blockade effective, for instance, at the entrance of a port, or at the mouth of a river with a small estuary, so long as circumstances allow the blockading ship to stay near enough to the entrance. In that case the area of operations is itself

³⁸ Gen. Davis says: "When the offense is one of egress, the penalty continues until the vessel reaches the territorial waters of a neutral state." *Elements of Int. Law*, p. 476.

³⁹ British Parliamentary Papers, Miscellaneous No. 4 (1909) p. 255ff.

near the coast. But, on the other hand, if circumstances force her to remain far off, one ship may not be enough to secure effectiveness, and to maintain this she will then have to be supported by others. From this cause the area of operations becomes wider, and extends further from the coast. It may therefore vary with circumstances, and with the number of blockading ships; but it will always be limited by the condition that effectiveness must be assured.

"It does not seem possible to fix the limits of the area of operations in definite figures, any more than to fix beforehand and definitely the number of ships necessary to assure the effectiveness of any blockade. These points must be settled according to circumstances in each particular case of a blockade. This might, perhaps, be done at the time of making the declaration.

"It is clear that a blockade will not be established in the same way on a defenseless coast as on one possessing all modern means of defense. In the latter case there could be no question of enforcing a rule such as that which formerly required that ships should be stationary and sufficiently close to the blockaded places. The position would be too dangerous for the ships of the blockading force, which, besides, now possess more powerful means of watching effectively a much wider zone than formerly.

"The area of operations of a blockading naval force may be rather wide; but as it depends on the number of ships contributing to the effectiveness of the blockade, and is always limited by the condition that it should be effective, it will never reach distant seas, where merchant vessels sail which are, perhaps, making for the blockaded ports, but whose destination is contingent on the changes which circumstances may produce in the blockade during their voyage. To sum up, the idea of the area of operations joined with that of effectiveness, as we have tried to define it, that is to say, including the zone of operations of the blockading forces, allows the belligerent effectively to exercise the right of blockade which he admittedly possesses, and, on the other hand, saves neutrals from exposure to the drawbacks of blockade at a great distance, while it leaves them free to run the risk which they knowingly

incur by approaching points to which access is forbidden by the belligerent.”⁴⁰

It was also provided that in effect this area of operations would be extended in case of pursuit of a vessel which had violated or attempted to violate the blockade:

“Article 20. A vessel, which in violation of blockade has left a blockaded port, or has attempted to enter the port, is liable to capture so long as she is pursued by a ship of the blockading force. If the pursuit is abandoned, or if the blockade is raised, her capture can no longer be effected.”

⁴⁰ *Id.*, No. 5, p. 41.

CHAPTER XXVI.

CONTINUOUS VOYAGE.

201. Continuous Voyage.

CONTINUOUS VOYAGE.

- 201. (a) By the doctrine of continuous voyage, as held in its extreme form, the ultimate destination, regardless of any intermediate destination of vessels or goods, determined their treatment on the seas outside of neutral jurisdiction.**
- (b) By the Declaration of London, 1909 (article 30), the doctrine was restricted so as to apply to absolute contraband only.**

(a) It was a common practice of the eighteenth century to limit the carrying trade between mother country and the dependencies to domestic vessels. Many states still impose restrictions upon the coasting and domestic carrying trade. When, in the war of 1756, France opened to the Dutch the trade with her colonies previously confined to her own vessels, the English maintained that the Dutch vessels thus engaged were practically in the commercial navy of France, and liable to similar treatment. Dutch vessels were accordingly captured and condemned. There were, however, various treaties prior to 1756 by the provisions of which one of the parties to the treaty was to be permitted in time of war to trade at ports belonging to the enemy of the other party.¹ Freedom of trade, which had been a matter of treaty agreement in early years, was claimed by the Armed Neutrality of 1780 as a matter of general right. The British Orders in Council, restricting trade, a few years later, met with opposition. Questions arose as to what constituted a voyage, and as to when the cargo was deposited, and at what period a vessel was liable to capture. In the case of *The William*, Sir William Scott, in 1805, gave full con-

¹ Int. Law Topics, U. S. Naval War College, 1905, p. 77.

sideration to the question of the termination of a voyage, and says that, "if the voyage from the place of lading be not really ended, it matters not by what acts the party may have evinced his desire of making it appear to have ended."²

The British doctrine of continuous voyage was gradually extended. As originally enunciated it was intended to apply to comparatively slow-moving sailing vessels. The aim of the rule was to prevent the giving of aid to a belligerent by a neutral. It is undoubtedly proper for one belligerent to take measures which will prevent a neutral from aiding his opponent in his warlike undertaking. Therefore it is generally held that he may capture and confiscate contraband having a belligerent destination or seize vessel and goods bound for a blockaded port. The question of destination becomes one of great importance. It is undeniable that neutral commerce in

² What, with reference to this subject, is to be considered a direct voyage from one place to another? Nobody has ever supposed that a mere deviation from the straightest and a shortest course in which the voyage could be performed would change its destination and make it cease to be a direct one within the intendment of the instructions. Nothing can depend on the degree or the direction of the deviation, whether it be of more or fewer leagues, whether toward the coast of Africa or toward that of America. Neither will it be contended that the point from which the commencement of a voyage is to be reckoned changes as often as the ship stops in the course of it. Nor will it the more change because a party may choose arbitrarily, by the ship's papers or otherwise, to give the name of a distinct voyage to each stage of a ship's progress. The act of shifting the cargo from the ship to the shore and from the shore back again to the ship does not necessarily amount to the termination of one voyage and the commencement of another. It may be wholly unconnected with any purpose of importation into the place where it is done. Supposing the landing to be merely for the purpose of airing or drying the goods, or of repairing the ship, would any man think of describing the voyage as beginning at the place where it happened to become necessary to go through such a process? Again, let it be supposed that the party has a motive for desiring to make the voyage appear to begin at some other place than that of the original lading, and that he therefore lands the cargo purely and solely for the purpose of enabling himself to affirm that it was at such other place that the goods were taken on board, would this contrivance at all alter the truth of the fact? Would not the real voyage still be from the place of the original shipment, notwithstanding the attempt to give

goods of whatever kind, if bona fide commerce between neutral ports, cannot be interrupted.

The destination of the vessel is usually evident from the ship's papers, and should always be thus shown. If the port of ultimate destination and all intermediate ports of call are neutral, there can be no question that the destination is neutral. If any port, an intermediate or ultimate port, is belligerent, the destination is considered belligerent.

As a general rule the destination of the cargo is held to follow the destination of the vessel. This might be said to be almost the sole rule for determining the destination of cargo before the American Civil War. At that time new positions began to be taken. These positions referred back to English practice in the war with France for support. The new doctrine separates vessel and cargo, and considers that a vessel

it the appearance of having begun from a different place? The truth may not always be discernible; but, when it is discovered, it is according to the truth, and not according to the fiction, that we are to give to the transaction its character and denomination. If the voyage from the place of lading be not really ended, it matters not by what acts the party may have evinced his desire of making it appear to have ended. That those acts have been attended with trouble and expense cannot alter their quality or their effect. The trouble and expense may weigh as circumstances of evidence to show the purpose for which the acts were done; but, if the evasive purpose be admitted or proved, we can never be bound to accept, as a substitute for the observance of the law, the means, however operose, which have been employed to cover a breach of it. Between the actual importation by which a voyage is really ended, and the colorable importation which is to give it the appearance of being ended, there must necessarily be a great resemblance. The acts to be done must be almost entirely the same; but there is this difference between them: The landing of the cargo, the entry at the custom house, and the payment of such duties as the law of the place requires, are necessary ingredients in a genuine importation. The true purpose of the owner cannot be effected without them. But in a fictitious importation they are mere voluntary ceremonies, which have no natural connection whatever with the purpose of sending on the cargo to another market, and which, therefore, would never be resorted to by a person entertaining that purpose, except with a view of giving to the voyage, which he has resolved to continue, the appearance of being broken by an importation which he has resolved not really to make. The *William*, 5 C. Rob. 387.

may have a neutral destination, while the cargo may have a belligerent destination, or that the cargo may be bound for a blockaded port, while the vessel upon which it is for the time being has a neutral destination.

During the American Civil War the Supreme Court, referring to the precedents in the opinions of Lord Stowell, gave further new interpretations to the principles and a decided extension to the doctrine of continuous voyage. While Lord Stowell had applied the doctrine to vessels of one of the belligerents carrying on forbidden trade with the enemy, the United States courts extended the doctrine to neutral vessels and cargo sailing from neutral ports with intent to violate blockade, even if a neutral port should be the immediate point toward which the vessel was bound with the intent of there interrupting the voyage. Under the ordinary rules of war of the time the vessel and cargo would be liable to capture when bound directly for the blockaded port. The new interpretation extended the liability to capture to the voyage between the port of departure and the neutral port of call, provided the intent to proceed to the blockaded port could be proven to exist during the earlier stage of the voyage.

In the case of *The Circassian*, decided in 1864, it was affirmed that:

"A vessel sailing from a neutral port with intent to violate a blockade is liable to capture and condemnation as a prize from the time of sailing, though she intend to call at another neutral port, not reached at time of capture, before proceeding to her ulterior destination."³

The case of *The Springbok*, decided in the United States Supreme Court in 1866, gave full extension to the doctrine of continuous voyage. This vessel sailed from London December 8, 1862, on a voyage ostensibly for Nassau. The vessel was captured before reaching that port, and brought into New York, where she was libeled as prize. The District Court condemned the vessel and cargo as prize of war. The case was appealed to the Supreme Court, which reversed the decree as to the vessel, and affirmed the decree as to the cargo.

The summary of the case shows that, when goods destined

³ 2 Wall. 135, 17 L. Ed. 796.

for a belligerent are in transit between neutral ports in a neutral ship, the ship is liable to seizure in order to secure the condemnation of the goods, but itself may not be condemned as prize.

In regard to the cargo, Mr. Chief Justice Chase gave the opinion of the court that:

"Upon the whole case we cannot doubt that the cargo was originally shipped with the intent to violate the blockade; that the owners of the cargo intended that it should be transshipped at Nassau into some vessel more likely to succeed in reaching a blockaded port than the Springbok; that the voyage from London to the blockaded port was, as to the cargo, both in law and in intent of the parties, one voyage; and that the liability to condemnation, if captured during any part of the voyage, attached to the cargo from the time of sailing."⁴

The decisions of the United States courts relating to continuous voyage of vessels or cargo have met with much adverse criticism.⁵

⁴ 5 Wall. 1, 18 L. Ed. 480. See, also, *The Stephen Hart*, 3 Wall. 559, 18 L. Ed. 220; *The Peterhoff*, 5 Wall. 28, 18 L. Ed. 564; *The Bermuda*, 3 Wall. 514, 18 L. Ed. 200.

⁵ Wharton, in an editorial note (3 Digest of Int. Law of the United States, p. 405), says of the Springbok Case: "The decision cannot be accepted without discarding those rules as to neutral rights for which the United States made war in 1812, and which, except in *The Springbok* and cognate cases, the executive department of the United States government, when stating the law, has since then consistently vindicated. The first of these is that blockades must be of specific ports. The second is that there can be no confiscation of noncontraband goods owned by neutrals and in neutral ships, on the ground that it is probable that such goods may be, at one or more intermediate ports, transhipped or retranshipped, and then find their way to a port blockaded by the party seizing."

Hall says of the decision: "By the American courts this idea of continuous voyage was seized upon and applied to cases of contraband and blockade. Vessels were captured while on their voyage from one neutral port to another, and were then condemned as carriers of contraband or for intent to break blockade. They were thus condemned, not for an act—for the act done was in itself innocent, and no previous act existed with which it could be connected, so as to form a noxious whole—but on mere suspicion of intention to do an act. Between the grounds upon which these and the English cases were decided there was, of course, no analogy. The American deci-

The British Manual of Naval Prize Law (1888) states: "The ostensible destination of the vessel is sometimes a neutral port, while she is in reality intended, after touching, and even landing and colorably delivering over her cargo there, to proceed with the same cargo to an enemy port. In such a case the voyage is held to be 'continuous,' and the destination is held to be hostile throughout."⁶ The same manual also provided that, "if the destination of the vessel be neutral, then the destination of the goods on board should be considered neutral, notwithstanding it may appear from the papers or otherwise that the goods themselves have an ulterior hostile destination, to be attained by transshipment, overland conveyance, or otherwise." This section of the Naval Prize Law was brought to a test by the seizure during the South African War, in December, 1899, and January, 1900, of three German vessels, the *Herzog*, the *General*, and the *Bundesrath*. These vessels were carrying supplies to the neutral port of Lourenço Marquez on Delagoa Bay, which was connected by rail with the South African Republic. Great Britain asserted the right to visit and search these vessels. The German government protested "that, whatever there may have been on board the *Bundesrath*, there could have been no contraband of war, since, according to the recognized principles of international law, there cannot be contraband of war in trade between neutral ports," and called attention to the section of the Manual

sions have been universally reprobated outside the United States, and would probably now find no defenders in their own country." *Int. Law* (5th Ed.) p. 669.

A committee of the Institute of International Law said:

"That the theory in question must be regarded as a serious inroad upon the rights of neutral nations, inasmuch as the fact of the destination of a neutral vessel to a neutral port would no longer suffice of itself to prevent the capture of goods noncontraband on board.

"That, furthermore, the result would be that, as regards blockade, every neutral port to which a neutral vessel might be carrying a neutral cargo would become constructively a blockaded port, if there were the slightest ground for suspecting that the cargo, after being unladen in such neutral port, was intended to be forwarded in some other vessel to some port actually blockaded."

For this and other extended discussion, see 7 Moore, §§ 1256-1262.

⁶ No. 71, p. 22.

of Naval Prize Law, to the effect that "the destination of the vessel is conclusive as to the destination of the goods on board." Lord Salisbury replied that:

"In the opinion of Her Majesty's government the passage cited from the manual 'that the destination of the vessel is conclusive as to the destination of the goods on board,' has no application to such circumstances as had now arisen.

"It cannot apply to contraband of war on board of a neutral vessel, if such contraband was at the time of seizure consigned or intended to be delivered to an agent of the enemy at a neutral port, or, in fact, destined for the enemy's country.

"The true view in regard to the latter category of goods is, as Her Majesty's government believe, correctly stated in paragraph 813 of Professor Bluntschli's 'Droit International Codifié' (French translation of 1874, second edition of the work of this eminent German jurist): 'Si les navires ou marchandises ne sont expédiés à destination d'un port neutre que pour mieux venir en aide à l'ennemi, il y aura contrebande de guerre et la confiscation sera justifiée.'

"Her Majesty's government are unable, therefore, to agree that there are grounds for ordering the release of the *Bundesrath* without examination by the prize court as to whether she was carrying contraband of war belonging to or destined for the South African republics. But they fully recognize how desirable it is that this examination should be carried through at the earliest possible moment, and that all proper consideration should be shown for the owners and for innocent passengers and merchandise on board of her. Repeated and urgent instructions have been sent by telegraph for this purpose, and arrangements have been made for the speedy transmission of the mails."⁷

After examination of these German vessels they were released. The British government paid compensation for the delay. Atlay, stating his opinion in his edition of Hall's *International Law*, says that, if a similar case again arises, "I venture to think that the attitude of whatever British government may be in office will tend rather to the views expressed by Lord Salisbury than to those enunciated by Mr. Hall, and

⁷ Parliamentary Papers, Africa, No. 1 (1900).

that the destination of the cargo, not merely the destination of the vessel, will be the criterion.”⁸

Another case where the second stage of transportation was by land rather than by water, as in the case of the *Springbok*, was the case of the *Doelwyk*, a Dutch vessel captured by the Italian cruiser *Etna*, August 8, 1896, during the war between Italy and Abyssinia. The Italian court condemned vessel and cargo. This decision has also met with much unfavorable criticism.

The Institute of International Law in 1896 adopted a rule in regard to continuous voyage to the effect that enemy destination could be presumed in spite of transport to an intermediate neutral port, provided there was ample evidence of final enemy destination.⁹

The Japanese Regulations Governing Captures at Sea, March 7, 1907, provide: “Art. 17. In case of a ship, the destination of which is not the enemy’s territory, whether she calls at that destination and discharges cargo or not, if there is reason to believe that the cargo in question is being conveyed to the enemy’s territory, her voyage shall be regarded as a continuous voyage, and her destination shall be held to have been, from the commencement, the enemy’s territory.” The same regulations provided that the destination of the ship is the destination of the cargo.

The change in the means and methods of transportation has made new regulations necessary. With the increased opportunity for easy and quick intercourse between the enemy and neutral ports has come a corresponding danger to the other belligerent. Against this danger he must have an increased ability to protect himself. It has sometimes been stated that the application of the doctrine of continuous voyage limits the freedom of neutral commerce. The trade in contraband is undertaken in time of war particularly because of the exceptional profits. The profits of successful trade in contraband

⁸ Hall, *Int. Law* (5th Ed.) p. 671.

⁹ “La destination pour l’ennemi est présumée lorsque le transport va à l’un de ses ports, ou bien à un port neutre qui, d’après des preuves évidentes et de fait incontestable, n’est qu’une étape pour l’ennemi, comme but final de la même opération commerciale.”

15 *Annuaire de l’Institut* (1896), p. 231.

articles at such a time are exceptional, because the possession of such articles by the one belligerent gives him an advantage over the other belligerent which he would not otherwise have. For this advantage he is willing to pay a war price. The neutral furnishing him this advantage should not be permitted to act with impunity, nor is it reasonable that the other belligerent should be required to permit such action. The whole transaction would be contrary to the spirit of the laws of neutrality, and would simply serve to mask an unneutral act under the form of a legitimate transaction. There is no reason to regard a voyage as more legitimate because made more circuitously. The number of stopping places does not necessarily change the ultimate destination of a vessel, nor the number of transshipments the destination of its cargo. The present tendency of opinion seems to be toward a recognition of a reasonable and clearly defined doctrine of continuous voyage. "This means that the vessel and cargo may be captured wherever such vessel and cargo may be found outside of neutral jurisdiction, in case there is ample evidence of destination to a blockaded port, and that the interposition of a neutral port of call does not, whatever acts may there be performed, change the destination. This also means the treatment of the cargo is to be determined by its actual destination at the time of visit. It makes no difference whether a cargo destined for the enemy is carried on a final stage of its journey by overland or oversea transportation, the destination of the cargo is the essential fact, not the means by which it may reach its destination. Of course, the belligerent is always liable for any seizures which may be made of vessels and cargoes having innocent destinations, and for improper seizures damages must be paid. Ample evidence would therefore be necessary to justify seizure."¹⁰

(b) The question of the application of the doctrine of continuous voyage was one upon which great diversity of opinion existed at the International Naval Conference in 1908-09. It was at length decided that the doctrine could not, without grave dangers to neutral rights, and only with questionable military advantages, be applied to conditional contraband, and

¹⁰ Int. Law Topics, U. S. Naval War College, 1905, p. 106.

that with the limitation of the right of capture for breach of blockade to the "area of operations" it would be of little, if of any, service as applied to blockade.

It was, however, definitely recognized as applicable to absolute contraband, and a positive rule was enunciated in this regard:

"Article 30. Absolute contraband is liable to capture if it is shown to be destined to territory belonging to or occupied by the enemy, or to the armed forces of the enemy. It is immaterial whether the carriage of the goods is direct, or entails either transshipment or transport over land." ¹¹

¹¹ Appendix. p. 579.

CHAPTER XXVII.

UNNEUTRAL SERVICE.

202. Unneutral Service Defined.

203. Scope.

204. Penalty.

UNNEUTRAL SERVICE DEFINED.

202. A neutral, acting in such manner as to identify himself with the belligerent, is guilty of unneutral service, and liable to the penalties which an enemy may receive under similar circumstances.

For a long time it was common to attempt to bring certain acts which a neutral should not as a neutral undertake under some phase of the doctrine of contraband. It was natural that this attempt should be made, as the idea of contraband was well developed before the modern idea of neutrality was clearly defined. Hall uses the term "Analogues of Contraband," but admits that for such services as he thus denominates the analogy to contraband is "always remote," and further says: "They are invariably something distinctly more, or something distinctly less, than the transport of contraband amounts to."¹

"Whatever the name, a considerable range of actions, involving neither the doctrine of contraband nor the doctrine of blockade, should have some distinguishing name. Various names have been from time to time given to some of these actions, such as 'accidental contraband,' 'analogues of contraband,' 'enemy service,' 'unneutral service,' etc. The terms involving the use of the word 'contraband' are admittedly inappropriate and forced. The term 'enemy service' would be ambiguous, because often used in a sense not involving any of the actions here discussed. The phrase 'unneutral service' seems to be the least ambiguous and most distinctly descriptive. The decisions of the courts and the opinions of writers point clearly to the fact that it is the nature of the service which

¹ Hall, Int. Law (5th Ed.) p. 673.

must be considered in certain cases, while the nature and destination of the goods in case of contraband, and the military condition of the place in the case of blockade, determines the penalties."²

SCOPE OF UNNEUTRAL SERVICE.

203. Unneutral service in general includes the following acts, when undertaken by a neutral for a belligerent:

- (a) The carriage of enemy persons.**
- (b) The transmission of intelligence in the interest of the enemy.**
- (c) Aid by auxiliary coal, repair, supply, transport, or other vessels.**
- (d) Other service directly in aid of, or under orders or control of, the belligerent.**

(a) The carriage of enemy persons has been distinctly recognized as an act differing from the carriage of contraband. In the case of *The Orozembo*, an American merchant vessel was chartered by a merchant at Lisbon, ostensibly to proceed in ballast to Macao, and thence to take a cargo to America. She was specially fitted up for the carriage of passengers. Three Dutch officers of rank, and two persons of the civil service in the government of Batavia, with some others, were received on board, and the vessel actually sailed for Batavia. The vessel was condemned by the English courts upon the facts, because it was assumed that a contract had been entered into with the Dutch government before the vessel left Rotterdam. In the case of *The Friendship*, the vessel was condemned upon the ground that she was employed as a transport; the facts being that she was not allowed to take cargo, but shipped some eighty French sailors, who had been shipwrecked, and the passage was paid for by the French government, thus rendering them, not ordinary passengers, but members of the French navy, being transported from the United States to France.³

² Wilson, *Unneutral Service*, *Proceedings American Pol. Sci. Ass'n* (1904) 73. The French equivalent of the term "unneutral service" is "assistance hostile."

³ *The Orozembo*, 6 C. Rob. 430; *The Friendship*, *Id.* 420; *The Carolina*, 4 C. Rob. 256; *Yangtze Ins. Ass'n v. Indemnity Mutual Marine Ins. Co.*, [1908] 1 K. B. 910.

(b) The carriage of dispatches by a neutral in the service of a belligerent differs from the ordinary carriage of contraband of war. In the case of the carriage of dispatches the vessel is employed in the service of the belligerent, and the loss of the dispatches or persons would inflict, as a rule, no punishment upon the carrier. In the case of contraband goods, on the other hand, there is no presumption of intended aid to the enemy, and the loss of the goods confiscated—causing, as it does, a pecuniary loss—acts as a sufficient deterrent. The transporting of diplomatic dispatches knowingly by a neutral does not entail a penalty, since it is not regarded as an unneutral act, and it is the policy of nations to maintain diplomatic relations undisturbed by wars. Under the Hague Convention of 1907 the ordinary postal correspondence is exempt from unnecessary interference, “whatever its official or private character may be,” unless proceeding to or from a blockaded port. The exemption does not extend to the vessel carrying the mail, though the vessel should be interfered with as little as possible.⁴ The right of a belligerent to take noxious persons from an innocent neutral vessel arose in the celebrated case of the *Trent*. The facts in this case, briefly, are that in 1861 the Confederate government appointed Mr. Mason to England and Mr. Slidell to France, ostensibly as ministers, although not in reality such, because the Confederate government had not at that time been recognized, further than as a belligerent, and had no authority to maintain diplomatic relations. They took passage in the *Trent*—a regular steamer (British) carrying the mails—from Havana to Nassau, en route to Europe. A short distance out from Havana this vessel was overhauled by a United States vessel of war (the *San Jacinto*, Capt. Wilkes), and, after search, Messrs. Mason, Slidell, and their secretaries were taken from the British vessel, and carried to the United States, while the *Trent* was permitted to pursue her course. The dispatches of these gentlemen were concealed by them among the passengers, and were not discovered. There was nothing to connect the crew with the concealment of the dispatches. Immediately upon receipt in England of information of the action of Capt. Wilkes, demand was made

⁴ Right of Capture in Naval War, arts. I, II, Scott, *Hague Conferences*, p. 282.

for the release of the Confederate representatives and for a suitable apology on the part of the United States. The men were released by the United States, on the ground that the representatives should not have been taken from the vessel, but that the vessel should have been brought to port.⁵ The British Manual of Naval Prize Law provides that the commander will not be justified in taking enemy persons from neutral vessels, but should send the vessel to port for adjudication.⁶ Similar provision is made in regard to dispatches.⁷

A method of aiding the enemy by carriage or transmission of dispatches, which may be of greatest service, is by repetition of messages or signals. The hostile character of this service was recognized by Sir William Scott in the case of *The Atalanta* in 1808. "If war intervenes, and the other belligerent prevails to interrupt that communication (between mother country and colony), any person stepping in to lend himself to effect the same purpose, under the privilege of an ostensible neutral character, does in fact place himself in the service of the enemy state, and is justly to be considered in

⁵ 7 Moore, § 1265, gives the main points at issue as shown by the correspondence.

⁶ Under the head, "Neutral Vessels Acting in the Service of the Enemy," the British Manual of Naval Prize Law states:

"88. A commander should detain any neutral vessel which is being actually used as a transport for the carriage of soldiers or sailors by the enemy.

"89. The vessel should be detained, although she may have on board only a small number of enemy officers, or even of civil officials sent out on the public service of the enemy, and at the public expense.

"90. The carriage of ambassadors from the enemy to a neutral state, or from a neutral state to the enemy, is not forbidden to a neutral vessel, for the detention of which such carriage is therefore no cause.

"91. It will be no excuse for carrying enemy military persons that the master is ignorant of their character.

"92. It will be no excuse that he was compelled to carry such persons by duress of the enemy."

⁷ "104. The commander will not be justified in taking out of a vessel any enemy's dispatches he may have found on board, and then allowing the vessel to proceed. His duty is to detain the vessel and send her in for adjudication, together with the dispatches on board." *Id.* p. 28.

that character. Nor let it be supposed that it is an act of light and casual importance. The consequence of such a service is indefinite, infinitely beyond the effect of any contraband that can be conveyed. The carrying of two or three cargoes of stores is necessarily an assistance of limited nature; but in the transmission of dispatches may be conveyed the entire plan of the campaign, that may defeat all the projects of the other belligerent in that quarter of the world. * * * The practice has been, accordingly, that it is in considerable quantities only that the offense of contraband is contemplated. The case of dispatches is very different. It is impossible to limit a letter to so small a size as not to be capable of producing the most important consequences in the operations of the enemy. It is a service, therefore, which, in whatever degree it exists, can only be considered in one character, as an act of the most noxious and hostile nature.”⁸

Acts by neutrals in the nature of service to the enemy were often recognized by the courts as a distinct category during the first half of the nineteenth century.⁹ Dana, in a note to Wheaton, recognizes that such acts are of an entirely different character from the carriage of contraband. “Suppose a neutral vessel to transmit signals between two portions of a fleet engaged in hostile combined operations, and not in sight of each other. She is doubtless liable to condemnation. It is immaterial whether these squadrons are at sea, or in ports of their own country, or in neutral ports, or how far they are apart, or how important the signals actually transmitted may be to the general results of the war, or whether the neutral transmits them directly or through a repeating neutral vessel. The nature of the communication establishes its final destination, and it is immaterial how far the delinquent carries it on its way. The reason of the condemnation is the nature of the service in which the neutral is engaged.”¹⁰ With the development of telegraphy, particularly of wireless telegraphy, the

⁸ 6 C. Rob. 440.

⁹ *The Julia*, 8 Cranch, 181, 3 L. Ed. 528; *The Aurora*, 8 Cranch, 203, 3 L. Ed. 536; *The Hiram*, 8 Cranch, 444, 3 L. Ed. 619; *The Ariadne*, 2 Wheat. 143, 4 L. Ed. 205.

¹⁰ Wheaton, *Int. Law* (8th Ed.) p. 228, note.

recognition of the category of unneutral service has become even more essential.

(c) In recent times a large range of action has opened to neutrals in aiding a belligerent through auxiliary coal, repair, supply, transport, and cable ships, and similar vessels. Such vessels are engaged in action, distinctly unlike the commercial undertaking of the carriage of contraband. As Hall says, it "is something distinctly more" than the transport of contraband. It is common in modern proclamations to prohibit such service, and, if captured, vessels engaged in such service are regarded liable to treatment as enemy vessels.

(d) Other service directly in aid of the enemy is prohibited. The Hague Convention of 1907 provides that:

"A neutral cannot avail himself of his neutrality:

"(a) If he commits hostile acts against a belligerent.

"(b) If he commits acts in favor of a belligerent, particularly if he voluntarily enlists in the ranks of the armed force of one of the parties."¹¹

It was formerly the opinion that pilotage of a belligerent fleet by a neutral might be regarded as unneutral service. It was provided at The Hague in 1907, however, that "a neutral power may allow belligerent warships to employ its licensed pilots."¹²

PENALTY FOR UNNEUTRAL SERVICE.

204. The penalty for unneutral service is in general the same as that to which an enemy would be liable under similar conditions.

The neutral agent identifies himself with the belligerent, and is liable to the treatment which his assumed character involves. He may be made a prisoner of war,¹³ and the means by which he acts is liable to seizure, confiscation, or other

¹¹ Rights and Duties of Neutral Powers and Persons, art. XVII, Appendix, p. 548.

¹² Neutral Powers in Naval War, art. XI, Appendix, p. 564.

¹³ While, in general, the officers and crews of captured neutral vessels are not made prisoners of war, this exemption "does not apply to ships taking part in the hostilities." Right of Capture in Naval War, c. III. Scott, Hague Conventions, p. 283.

treatment which would render it incapable of further unneutral service.¹⁴ The Russian Declaration of February 14, 1904, states that: "There are assimilated to contraband of war the following acts, forbidden to neutrals: The transport of enemy troops, the dispatches or correspondence of the enemy, the furnishing of transports or ships of war to the enemy. Neutral vessels guilty of forbidden acts of this character may be, according to circumstances, seized and confiscated."

It is evident that a neutral repair vessel or a neutral collier, accompanying and serving a belligerent fleet, has so far forfeited its neutral character as to make it and its personnel liable to the treatment that would be accorded to a belligerent vessel serving in the same capacity. Professor Lawrence says of carrying contraband in contrast to unneutral service:

"They are unlike in nature, unlike in proof, and unlike in penalty. To carry contraband is to engage in an ordinary trading transaction, which is directed toward a belligerent community simply because a better market is likely to be found there than elsewhere. To perform unneutral service is to interfere in the struggle by doing in aid of a belligerent acts which are in themselves not mercantile, but warlike. In order that a cargo of contraband may be condemned as a good prize, the captors must show that it was on the way to a belligerent destination. If, without subterfuge, it is bound to a neutral port, the voyage is innocent, whatever may be the nature of the goods. In the case of unneutral service, the destination of the captured vessel is immaterial. The nature of her mission is the all-important point. She may be seized and confiscated when sailing between two neutral ports. The penalty of carrying contraband is the forfeiture of the forbidden goods; the ship being retained as prize of war only under special circumstances. The penalty for unneutral service is first and foremost the confiscation of the vessel; the goods on board being condemned when the owner is involved, or when fraud and concealment have been resorted to.

"Nothing but confusion can arise from attempting to treat together offenses so widely divergent as the two now under consideration."¹⁵

¹⁴ Dupuis, *La Guerre Maritime*, p. 282.

¹⁵ *Principles of Int. Law*, p. 633.

The Declaration of London, 1909, recognized the distinction between unneutral service and the carriage of contraband, or violation of blockade, and made specific provision for penalties for certain cases of unneutral service.

This Declaration (article 45) makes liable to the same treatment as for carriage of contraband:

(1) A neutral vessel which specifically engages in the transport of individuals of the enemy's armed forces or in the transmission of intelligence in the interest of the enemy.

(2) A neutral vessel which, with the knowledge of those in control, transports an enemy military detachment or persons who during the voyage directly assist the enemy operations.

The Declaration (article 46) assimilates a neutral vessel to an enemy merchant vessel:

(1) If she takes direct part in the hostilities.

(2) If she is under control of the enemy authority.

(3) If she is exclusively in the enemy employment.

(4) If she is exclusively engaged in transport of enemy troops or transmission of enemy intelligence.¹⁶

¹⁶ Appendix, p. 581.

CHAPTER XXVIII.

PRIZE.

- 205. Prize.
- 206. National Prize Court.
- 207. International Prize Court.

PRIZE.

205. "Prize is generally used as a technical term to express a legal capture."¹

While in early days prize was regarded as belonging to the person who made the capture, in modern warfare prize is regarded as belonging to the state.² Capture should be established by some act indicative of the intention to take possession.³ The right to capture naval stores as prize, even though at a naval station, has been maintained.⁴ Non-seagoing boats propelled by poling, boats on remote inland waters, and boats without means of propulsion are not considered as liable to capture as prize of war.⁵ Private property on land is not the subject of maritime prize.⁶ The domicile of the owner or of the house of trade is usually held to establish the liability to capture in states following the Anglo-Saxon jurisprudence and in some of the continental states, while other continental states adopt the principle of nationality of the owner as determining the liability of the property.⁷ Property captured at sea, however, can never be converted till after adjudication, and must so far as possible be maintained in a condition equal

¹ *Miller v. The Resolution*, 2 Dall. 1, 1 L. Ed. 263.

² *The Adventure*, 8 Cranch, 221, 3 L. Ed. 542; *The Siren v. United States*, 7 Wall. 163, 19 L. Ed. 129.

³ *The Grotius*, 9 Cranch, 368, 3 L. Ed. 762.

⁴ *United States v. Dewey*, 188 U. S. 254, 23 Sup. Ct. 415, 47 L. Ed. 463.

⁵ *The Cotton Plant v. United States*, 10 Wall. 577, 19 L. Ed. 983; *United States v. Dewey*, 188 U. S. 254, 23 Sup. Ct. 415, 47 L. Ed. 463.

⁶ *United States v. Alexander*, 2 Wall. 404, 17 L. Ed. 915.

⁷ *The Pedro*, 175 U. S. 368, 20 Sup. Ct. 138, 44 L. Ed. 195.

to that of the time of capture.⁸ The judgment of a national prize court was, prior to the Hague Convention of 1907, regarded as conclusive.⁹

NATIONAL PRIZE COURT.

206. The validity of maritime capture is determined in the first instance by the prize court of the belligerent captor.¹⁰

It has been repeatedly claimed that the prize court of a belligerent administers international law. Sir William Scott, in 1799, said of the basis of his function as a prize court judge: "I trust it has not escaped my anxious recollection for one moment what it is that the duty of my station calls for from me—namely, to consider myself as stationed here, not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference that justice which the law of nations holds out without distinction to independent states, some happening to be neutral and some to be belligerent. The seat of judicial authority is, indeed, locally here, in the belligerent country, according to the known law and practice of nations; but the law itself has no locality. It is the duty of the person who sits here to determine this question exactly as he would determine the same question if sitting at Stockholm: to assert no pretensions on the part of Great Britain which he would not allow to Sweden in the same circumstances; and to impose no duties on Sweden, as a neutral country, which he would not admit to belong to Great Britain and in the same character. If, therefore, I mistake the law in this matter, I mistake that which I consider, and which I mean should be considered, as the universal law upon the question—a question regarding one of the most important rights of belligerent nations relatively to neutrals."¹¹ This position has been repeatedly affirmed, both in British and other courts.

⁸ *Lamar v. Browne*, 92 U. S. 187, 23 L. Ed. 650.

⁹ *The Star*, 3 Wheat. 78, 4 L. Ed. 338.

¹⁰ For general subject, see 7 Moore, §§ 1222-1248.

¹¹ *The Maria*, 1 C. Rob. 340.

The judges of national prize courts are appointed and the courts are constituted according to municipal law, and have no direct international status.¹² They are responsible to their own state for their action.

The United States early and formally recognized the need of a properly constituted court for appeal, and on January 15, 1780, the American Congress—

“Resolved, that a court be established for the trial of all appeals from the courts of admiralty in these United States, in cases of capture, to consist of three judges, appointed and commissioned by Congress, either two of whom, in the absence of the other, to hold the said court for the dispatch of business.

“That the said court appoint their own register.

“That the trials therein be according to the usage of nations and not by jury.”¹³

In the United States the District Courts act as prize courts, with appeal to the Supreme Court. National prize courts are differently constituted in different states. Continental states often allow certain administrative officers to act upon prize.

The prize court sitting at Vladivostok during the Russo-Japanese War, which supported the action of Admiral Jessen in sinking the British steamer, *Knight Commander*, was largely made up of administrative officials; three of the six members being military officers. The decision of this court was followed by protests, and the case was appealed to a higher court; but the higher court was likewise a national court, and from the national court there was no appeal. Of course, the decision of the court might become a subject for diplomatic negotiation. The results of diplomatic negotiations are, however, often determined by political considerations, rather than by the principles of law.

The procedure in prize courts is usually such as to give due weight to the facts, regardless of too minute technicalities.

In many states the whole or a portion of the property con-

¹² The British courts are based on the Naval Prize Act, 1864 (St. 27 & 28 Vict. c. 25), and the Prize Court Act, 1894 (St. 57 & 58 Vict. c. 39).

¹³ 3 Jour. of Cong. p. 425.

demned as prize is distributed as prize money among the captors, according to rank and degree of participation in the capture.

The United States abolished this practice by an act of March 3, 1899, as follows: "All provisions of law authorizing the distribution among captors of the whole, or any portion, of the proceeds of vessels, or any property hereafter captured, condemned as prize, or providing for the payment of bounty for the sinking or destruction of vessels of the enemy hereafter occurring in time of war, are hereby repealed."¹⁴

INTERNATIONAL PRIZE COURT.

207. The Hague Conference of 1907 provided for the establishment of an international prize court, to which appeal from the decision of a national prize court could be taken.

Even when national prize courts have been constituted after the best existing models, their decisions have sometimes been regarded as unjust. Cases are not lacking where the decisions of the highest prize courts of a state have not been sustained when referred to an international commission for consideration.¹⁵ Such reference to an international commission had not been considered as in any way obligatory, but simply as a courtesy, which might or might not be conceded. Many cases, both in earlier and in recent wars, showed that, while the national prize courts might endeavor to administer justice impartially, there was often a belief that national bias made this impossible. There was also the feeling that, if national courts were administering international law impartially in cases of prize, there could be no valid objection to the reference of such cases to an international tribunal, which would observe the same law in its decisions, and at the same time be free from the imputation of possible bias. Indeed, it was believed that a decision rendered by an international prize court would meet approval more readily than the same decision ren-

¹⁴ 30 Stat. 1007 (U. S. Comp. St. 1901, p. 1072).

¹⁵ The Circassian, 4 Moore, Int. Arbitrations, pp. 3911-3923.

dered by a national prize court. The establishment of an international prize court was considered to be a step toward the removal of one of the causes of international differences, and in furtherance of peace.

Recognizing the advantages which might follow the establishment of an international prize court, and hoping to remove so far as possible causes of international friction, the Hague Conference of 1907 agreed upon a Convention Relative to the Creation of an International Prize Court.¹⁶

In this convention the functions, competence, constitution, and procedure of the international prize court are set forth at length and in detail. In general, provision is made for appeal from the national prize court in case of default or delay of justice; for a final decision to which the contracting powers will submit in good faith; for the appointment of judges of known proficiency in questions of international maritime law, fifteen of whom will constitute the court, and for the appointment of a naval officer, who may sit with the court as assessor; and for the method by which the case shall be brought before the court, for its conduct, and for the rendering of the decision.¹⁷

The Convention Relative to the Creation of an International Prize Court contained a clause in article VII to the effect that, if no treaty covered the question of law at issue, the court should apply the rules of international law, and "if no generally recognized rule exists, the court shall give judgment in accordance with the general principles of justice and equity." Certain states were unwilling to become parties to this convention while such wide diversity of opinion existed as to the rules of international law and the principles of justice and equity as applied to maritime capture as seemed to exist among the states which might most often as neutrals or belligerents come before the court.

Great Britain, accordingly, in 1908 took the initiative in calling a conference of the naval powers to formulate "the rules which, in the absence of special treaty provisions applica-

¹⁶ Convention Relative to the Creation of an International Prize Court, Appendix, p 554.

¹⁷ *Id.*, art. XVIII.

ble to a particular case, the court should observe in dealing with appeals brought before it for decision." In response to the invitation of Great Britain the representatives of ten powers assembled in what is known as the International Naval Conference at London on December 4, 1908, and in the Preliminary Provisions of the Declaration of London of February 26, 1909, stated that "the signatory powers are agreed that the rules contained in the following chapters correspond in substance with the generally recognized principles of international law." These rules cover the general field of warfare on the sea, containing chapters on blockade, contraband, unneutral service, destruction of neutral prizes, transfer to a neutral flag, enemy character, resistance to search, convoy, and compensation.¹⁸

The work of these international conferences at The Hague and elsewhere has been with the aim to establish uniform law among nations, whose relations are daily becoming closer, and whose highest prosperity depends upon the reign of justice.

¹⁸ Appendix, p. 574.

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APPENDIX I

DECLARATION OF PARIS

The Plenipotentiaries who signed the Treaty of Paris of the thirtieth of March, one thousand eight hundred and fifty-six, assembled in conference.

Considering:

That maritime law in time of war has long been the subject of deplorable disputes;

That the uncertainty of the law and of the duties in such a matter give rise to differences of opinion between neutrals and belligerents which may occasion serious difficulties, and even conflicts; that it is consequently advantageous to establish a uniform doctrine on so important a point;

That the Plenipotentiaries assembled in Congress at Paris cannot better respond to the intentions by which their Governments are animated, than by seeking to introduce into international relations fixed principles, in this respect.

The above-mentioned Plenipotentiaries, being duly authorized, resolved to concert among themselves as to the means of attaining this object; and having come to an agreement, have adopted the following solemn declaration:

1. Privateering is and remains abolished;
2. The neutral flag covers enemy's goods, with the exception of contraband of war;
3. Neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag;
4. Blockades, in order to be binding, must be effective—that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.

The Governments of the undersigned Plenipotentiaries engage to bring the present Declaration to the knowledge of the States which have not taken part in the Congress of Paris, and to invite them to accede to it.

Convinced that the maxims which they now proclaim cannot but be received with gratitude by the whole world, the undersigned Plenipotentiaries doubt not that the efforts of their Governments to obtain the general adoption thereof will be crowned with full success.

The present declaration is not and shall not be binding, except between those Powers who have acceded, or shall accede, to it.

Done at Paris, the sixteenth of April, one thousand eight hundred and fifty-six.

APPENDIX II

INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD

GENERAL ORDERS,)	WAR DEPARTMENT,
No. 100.)	ADJUTANT-GENERAL'S OFFICE,
	WASHINGTON, APRIL 24, 1863.

The following "Instructions for the Government of Armies of the United States in the Field," prepared by Francis Lieber, LL. D., and revised by a Board of Officers, of which Major-General E. A. Hitchcock is president, having been approved by the President of the United States, he commands that they be published for the information of all concerned.

BY ORDER OF THE SECRETARY OF WAR:

E. D. TOWNSEND,
Assistant Adjutant-General.

SECTION I.—MARTIAL LAW—MILITARY JURISDICTION— MILITARY NECESSITY—RETALIATION.

1. A place, district, or country occupied by an enemy stands, in consequence of the occupation, under the Martial Law of the invading or occupying army, whether any proclamation declaring Martial Law, or any public warning to the inhabitants, has been issued or not. Martial Law is the immediate and direct effect and consequence of occupation or conquest.

The presence of a hostile army proclaims its Martial Law.

2. Martial Law does not cease during the hostile occupation, except by special proclamation, ordered by the commander-in-chief; or by special mention in the treaty of peace concluding the war, when the occupation of a place or territory continues beyond the conclusion of peace as one of the conditions of the same.

3. Martial Law in a hostile country consists in the suspension, by the occupying military authority, of the criminal and civil law, and of the domestic administration and government in the occupied place or territory, and in the substitution of military rule and force for the same, as well as in the dictation of general laws, as far as military necessity requires this suspension, substitution, or dictation.

The commander of the forces may proclaim that the administration of all civil and penal law shall continue, either wholly or in

part, as in times of peace, unless otherwise ordered by the military authority.

4. Martial Law is simply military authority exercised in accordance with the laws and usages of war. Military oppression is not Martial Law; it is the abuse of the power which that law confers. As Martial Law is executed by military force, it is incumbent upon those who administer it to be strictly guided by the principles of justice, honor, and humanity—virtues adorning a soldier even more than other men, for the very reason that he possesses the power of his arms against the unarmed.

5. Martial Law should be less stringent in places and countries fully occupied and fairly conquered. Much greater severity may be exercised in places or regions where actual hostilities exist, or are expected and must be prepared for. Its most complete sway is allowed—even in the commander's own country—when face to face with the enemy, because of the absolute necessities of the case, and of the paramount duty to defend the country against invasion.

To save the country is paramount to all other considerations.

6. All civil and penal law shall continue to take its usual course in the enemy's places and territories under Martial Law, unless interrupted or stopped by order of the occupying military power; but all the functions of the hostile government—legislative, executive, or administrative—whether of a general, provincial, or local character, cease under Martial Law, or continue only with the sanction, or if deemed necessary, the participation of the occupier or invader.

7. Martial Law extends to property, and to persons, whether they are subjects of the enemy or aliens to that government.

8. Consuls, among American and European nations, are not diplomatic agents. Nevertheless, their offices and persons will be subjected to Martial Law in cases of urgent necessity only; their property and business are not exempted. Any delinquency they commit against the established military rule may be punished as in the case of any other inhabitant, and such punishment furnishes no reasonable ground for international complaint.

9. The functions of Ambassadors, Ministers, or other diplomatic agents, accredited by neutral powers to the hostile government, cease, so far as regards the displaced government; but the conquering or occupying power usually recognizes them as temporarily accredited to itself.

10. Martial Law affects chiefly the police and collection of public revenue and taxes, whether imposed by the expelled government or by the invader, and refers mainly to the support and efficiency of the army, its safety, and the safety of its operations.

11. The law of war does not only disclaim all cruelty and bad faith concerning engagements concluded with the enemy during the war, but also the breaking of stipulations solemnly contracted by the belligerents in time of peace, and avowedly intended to remain in force in case of war between the contracting powers.

It disclaims all extortions and other transactions for individual gain; all acts of private revenge, or connivance at such acts.

Offences to the contrary shall be severely punished, and especially so if committed by officers.

12. Whenever feasible, Martial Law is carried out in case of individual offenders by Military Courts; but sentences of death shall be executed only with the approval of the chief executive, provided the urgency of the case does not require a speedier execution, and then only with the approval of the chief commander

13. Military jurisdiction is of two kinds: First, that which is conferred and defined by statute; second, that which is derived from the common law of war. Military offences under the statute law must be tried in the manner therein directed; but military offences which do not come within the statute must be tried and punished under the common law of war. The character of the courts which exercise these jurisdictions depends upon the local laws of each particular country.

In the armies of the United States the first is exercised by courts-martial; while cases which do not come within the "Rules and Articles of War," or the jurisdiction conferred by statute on courts-martial, are tried by military commissions.

14. Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.

15. Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another, and to God.

16. Military necessity does not admit of cruelty, that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.

17. War is not carried on by arms alone. It is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy.

18. When the commander of a besieged place expels the non-combatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back, so as to hasten on the surrender.

19. Commanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the non-combatants, and especially the women and children, may be removed before the bombardment commences. But it is no infraction of the common law of war to omit thus to inform the enemy. Surprise may be a necessity.

20. Public war is a state of armed hostility between sovereign nations or governments. It is a law and requisite of civilized existence that men live in political, continuous societies, forming organized units, called states or nations, whose constituents bear, enjoy, and suffer, advance and retrograde together, in peace and in war.

21. The citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of the war.

22. Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.

23. Private citizens are no longer murdered, enslaved, or carried off to distant parts, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war.

24. The almost universal rule in remote times was, and continues to be with barbarous armies, that the private individual of the hostile country is destined to suffer every privation of liberty and protection, and every disruption of family ties. Protection was, and still is with uncivilized people, the exception.

25. In modern regular wars of the Europeans, and their descendants in other portions of the globe, protection of the inoffensive citizen of the hostile country is the rule; privation and disturbance of private relations are the exceptions.

26. Commanding generals may cause the magistrates and civil officers of the hostile country to take the oath of temporary allegiance or an oath of fidelity to their own victorious government or rulers, and they may expel every one who declines to do so. But whether they do so or not, the people and their civil officers owe

strict obedience to them as long as they hold sway over the district or country, at the peril of their lives.

27. The law of war can no more wholly dispense with retaliation than can the law of nations, of which it is a branch. Yet civilized nations acknowledge retaliation as the sternest feature of war. A reckless enemy often leaves to his opponent no other means of securing himself against the repetition of barbarous outrage.

28. Retaliation will, therefore, never be resorted to as a measure of mere revenge, but only as a means of protective retribution, and, moreover, cautiously and unavoidably; that is to say, retaliation shall only be resorted to after careful inquiry into the real occurrence, and the character of the misdeeds that may demand retribution.

Unjust or inconsiderate retaliation removes the belligerents farther and farther from the mitigating rules of a regular war, and by rapid steps leads them nearer to the internecine wars of savages.

29. Modern times are distinguished from earlier ages by the existence, at one and the same time, of many nations and great governments related to one another in close intercourse.

Peace is their normal condition; war is the exception. The ultimate object of all modern war is a renewed state of peace.

The more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief.

30. Ever since the formation and co-existence of modern nations, and ever since wars have become great national wars, war has come to be acknowledged not to be its own end, but the means to obtain great ends of state, or to consist in defense against wrong; and no conventional restriction of the modes adopted to injure the enemy is any longer admitted; but the law of war imposes many limitations and restrictions on principles of justice, faith, and honor.

SECTION II.—PUBLIC AND PRIVATE PROPERTY OF THE ENEMY—PROTECTION OF PERSONS, AND ESPECIALLY WOMEN; OF RELIGION, THE ARTS AND SCIENCES—PUNISHMENT OF CRIMES AGAINST THE INHABITANTS OF HOSTILE COUNTRIES.

31. A victorious army appropriates all public money, seizes all public movable property until further direction by its government, and sequesters for its own benefit or that of its government all the revenues of real property belonging to the hostile government or nation. The title to such real property remains in abeyance during military occupation, and until the conquest is made complete.

32. A victorious army, by the martial powers inherent in the same, may suspend, change, or abolish, as far as the martial power extends, the relations which arise from the services due, according to the ex-

isting laws of the invaded country, from one citizen, subject, or native of the same to another.

The commander of the army must leave it to the ultimate treaty of peace to settle the permanency of this change.

33. It is no longer considered lawful—on the contrary, it is held to be a serious breach of the law of war—to force the subjects of the enemy into the service of the victorious government, except the latter should proclaim, after a fair and complete conquest of the hostile country or district, that it is resolved to keep the country, district, or place permanently as its own, and make it a portion of its own country.

34. As a general rule, the property belonging to churches, to hospitals, or other establishments of an exclusively charitable character, to establishments of education, or foundations for the promotion of knowledge, whether public schools, universities, academies of learning or observatories, museums of the fine arts, or of a scientific character—such property is not to be considered public property in the sense of paragraph 31; but it may be taxed or used when the public service may require it.

35. Classical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes, as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded.

36. If such works of art, libraries, collections, or instruments belonging to a hostile nation or government, can be removed without injury, the ruler of the conquering state or nation may order them to be seized and removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace.

In no case shall they be sold or given away, if captured by the armies of the United States, nor shall they ever be privately appropriated, or wantonly destroyed or injured.

37. The United States acknowledge and protect, in hostile countries occupied by them, religion and morality; strictly private property; the persons of the inhabitants, especially those of women; and the sacredness of domestic relations. Offences to the contrary shall be rigorously punished.

This rule does not interfere with the right of the victorious invader to tax the people or their property, to levy forced loans, to billet soldiers, or to appropriate property, especially houses, land, boats or ships, and churches, for temporary and military uses.

38. Private property, unless forfeited by crimes or by offences of the owner, can be seized only by way of military necessity, for the support or other benefit of the army of the United States.

If the owner has not fled, the commanding officer will cause receipts to be given, which may serve the spoliated owner to obtain indemnity.

39. The salaries of civil officers of the hostile government who remain in the invaded territory, and continue the work of their

office, and can continue it according to the circumstances arising out of the war—such as judges, administrative or police officers, officers of city or communal governments—are paid from the public revenue of the invaded territory, until the military government has reason wholly or partially to discontinue it. Salaries or incomes connected with purely honorary titles are always stopped.

40. There exists no law or body of authoritative rules of action between hostile armies, except that branch of the law of nature and nations which is called the law and usages of war on land.

41. All municipal law of the ground on which the armies stand, or of the countries to which they belong, is silent and of no effect between armies in the field.

42. Slavery, complicating and confounding the ideas of property, (that is of a thing,) and of personality, (that is of humanity,) exists according to municipal law or local law only. The law of nature and nations has never acknowledged it. The digest of the Roman law enacts the early dictum of the pagan jurist, that "so far as the law of nature is concerned, all men are equal." Fugitives escaping from a country in which they were slaves, villains, or serfs, into another country, have, for centuries past, been held free and acknowledged free by judicial decisions of European countries, even though the municipal law of the country in which the slave had taken refuge acknowledged slavery within its own dominions.

43. Therefore, in a war between the United States and a belligerent which admits of slavery, if a person held in bondage by that belligerent be captured by or come as a fugitive under the protection of the military forces of the United States, such person is immediately entitled to the rights and privileges of a free man. To return such person into slavery would amount to enslaving a free person, and neither the United States nor any officer under their authority can enslave any human being. Moreover, a person so made free by the law of war is under the shield of the law of nations, and the former owner or state can have, by the law of post-liminy, no belligerent lien or claim of service.

44. All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offence.

A soldier, officer or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior.

45. All captures and booty belong, according to the modern law of war, primarily to the government of the captor.

Prize money, whether on sea or land, can now only be claimed under local law.

46. Neither officers nor soldiers are allowed to make use of their position or power in the hostile country for private gain, not even for commercial transactions otherwise legitimate. Offences to the contrary committed by commissioned officers will be punished with cashiering or such other punishment as the nature of the offence may require; if by soldiers, they shall be punished according to the nature of the offence.

47. Crimes punishable by all penal codes, such as arson, murder, maiming, assaults, highway robbery, theft, burglary, fraud, forgery, and rape, if committed by an American soldier in a hostile country against its inhabitants, are not only punishable as at home, but in all cases in which death is not inflicted, the severer punishment shall be preferred.

SECTION III.—DESERTERS—PRISONERS OF WAR—HOSTAGES—BOOTY ON THE BATTLE-FIELD.

48. Deserters from the American army, having entered the service of the enemy, suffer death if they fall again into the hands of the United States, whether by capture, or being delivered up to the American army; and if a deserter from the enemy, having taken service in the army of the United States, is captured by the enemy, and punished by them with death or otherwise, it is not a breach against the law and usages of war, requiring redress or retaliation.

49. A prisoner of war is a public enemy armed or attached to the hostile army for active aid, who has fallen into the hands of the captor, either fighting or wounded, on the field or in the hospital, by individual surrender or by capitulation.

All soldiers, of whatever species of arms; all men who belong to the rising en masse of the hostile country; all those who are attached to the army for its efficiency and promote directly the object of the war, except such as are hereinafter provided for; all disabled men or officers on the field or elsewhere, if captured; all enemies who have thrown away their arms and ask for quarter, are prisoners of war, and as such exposed to the inconveniences as well as entitled to the privileges of a prisoner of war.

50. Moreover, citizens who accompany an army for whatever purpose, such as sutlers, editors, or reporters of journals, or contractors, if captured, may be made prisoners of war, and be detained as such.

The monarch and members of the hostile reigning family, male or female, the chief, and chief officers of the hostile government, its diplomatic agents, and all persons who are of particular and singular use and benefit to the hostile army or its government, are, if captured on belligerent ground, and if unprovided with a safe conduct granted by the captor's government, prisoners of war.

51. If the people of that portion of an invaded country which is not yet occupied by the enemy, or of the whole country, at the ap-

proach of a hostile army, rise under a duly authorized levy, en masse to resist the invader, they are now treated as public enemies, and if captured, are prisoners of war.

52. No belligerent has the right to declare that he will treat every captured man in arms of a levy en masse as a brigand or bandit.

If, however, the people of a country, or any portion of the same, already occupied by an army, rise against it, they are violators of the laws of war, and are not entitled to their protection.

53. The enemy's chaplains, officers of the medical staff, apothecaries, hospital nurses and servants, if they fall into the hands of the American army, are not prisoners of war, unless the commander has reasons to retain them. In this latter case, or if, at their own desire, they are allowed to remain with their captured companions, they are treated as prisoners of war, and may be exchanged if the commander sees fit.

54. A hostage is a person accepted as a pledge for the fulfillment of an agreement concluded between belligerents during the war, or in consequence of a war. Hostages are rare in the present age.

55. If a hostage is accepted, he is treated like a prisoner of war, according to rank and condition, as circumstances may admit.

56. A prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity.

57. So soon as a man is armed by a sovereign government, and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts, are no individual crimes or offenses. No belligerent has a right to declare that enemies of a certain class, color, or condition, when properly organized as soldiers, will not be treated by him as public enemies.

58. The law of nations knows of no distinction of color, and if an enemy of the United States should enslave and sell any captured persons of their army, it would be a case for the severest retaliation, if not redressed upon complaint.

The United States cannot retaliate by enslavement; therefore death must be the retaliation for this crime against the law of nations.

59. A prisoner of war remains answerable for his crimes committed against the captor's army or people, committed before he was captured, and for which he has not been punished by his own authorities.

All prisoners of war are liable to the infliction of retaliatory measures.

60. It is against the usage of modern war to resolve, in hatred and revenge, to give no quarter. No body of troops has the right to declare that it will not give, and therefore will not expect, quarter; but a commander is permitted to direct his troops to give no quarter, in great straits, when his own salvation makes it impossible toumber himself with prisoners.

61. Troops that give no quarter have no right to kill enemies already disabled on the ground, or prisoners captured by other troops.

62. All troops of the enemy known or discovered to give no quarter in general, or to any portion of the army, receive none.

63. Troops who fight in the uniform of their enemies, without any plain, striking, and uniform mark of distinction of their own, can expect no quarter.

64. If American troops capture a train containing uniforms of the enemy, and the commander considers it advisable to distribute them for use among his men, some striking mark or sign must be adopted to distinguish the American soldier from the enemy.

65. The use of the enemy's national standard, flag, or other emblem of nationality, for the purpose of deceiving the enemy in battle, is an act of perfidy by which they lose all claim to the protection of the laws of war.

66. Quarter having been given to an enemy by American troops, under a misapprehension of his true character, he may, nevertheless, be ordered to suffer death if, within three days after the battle it be discovered that he belongs to a corps which gives no quarter.

67. The law of nations allows every sovereign government to make war upon another sovereign state, and, therefore, admits of no rules or laws different from those of regular warfare, regarding the treatment of prisoners of war, although they may belong to the army of a government which the captor may consider as a wanton and unjust assailant.

68. Modern wars are not internecine wars, in which the killing of the enemy is the object. The destruction of the enemy in modern war, and, indeed, modern war itself, are means to obtain that object of the belligerent which lies beyond the war.

Unnecessary or revengeful destruction of life is not lawful.

69. Outposts, sentinels, or pickets are not to be fired upon, except to drive them in, or when a positive order, special or general, has been issued to that effect.

70. The use of poison in any manner, be it to poison wells, or food, or arms, is wholly excluded from modern warfare. He that uses it puts himself out of the pale of the law and usages of war.

71. Whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death, if duly convicted, whether he belongs to the army of the United States, or is an enemy captured after having committed his misdeed.

72. Money and other valuables on the person of a prisoner, such as watches or jewelry, as well as extra clothing, are regarded by the American army as the private property of the prisoner, and the appropriation of such valuables or money is considered dishonorable, and is prohibited.

Nevertheless, if large sums are found upon the persons of prisoners, or in their possession, they shall be taken from them, and the

surplus, after providing for their own support, appropriated for the use of the army, under the direction of the commander, unless otherwise ordered by the government. Nor can prisoners claim, as private property, large sums found and captured in their train, although they had been placed in the private luggage of the prisoners.

73. All officers, when captured, must surrender their side-arms to the captor. They may be restored to the prisoner in marked cases, by the commander, to signalize admiration of his distinguished bravery, or approbation of his humane treatment of prisoners before his capture. The captured officer to whom they may be restored cannot wear them during captivity.

74. A prisoner of war being a public enemy, is the prisoner of the government, and not of the captor. No ransom can be paid by a prisoner of war to his individual captor, or to any officer in command. The government alone releases captives, according to rules prescribed by itself.

75. Prisoners of war are subject to confinement or imprisonment such as may be deemed necessary on account of safety, but they are to be subjected to no other intentional suffering or indignity. The confinement and mode of treating a prisoner may be varied during his captivity according to the demands of safety.

76. Prisoners of war shall be fed upon plain and wholesome food whenever practicable, and treated with humanity.

They may be required to work for the benefit of the captor's government, according to their rank and condition.

77. A prisoner of war who escapes may be shot, or otherwise killed in his flight; but neither death nor any other punishment shall be inflicted upon him simply for his attempt to escape, which the law of war does not consider a crime. Stricter means of security shall be used after an unsuccessful attempt at escape.

If, however, a conspiracy is discovered, the purpose of which is a united or general escape, the conspirators may be rigorously punished, even with death; and capital punishment may also be inflicted upon prisoners of war discovered to have plotted rebellion against the authorities of the captors, whether in union with fellow-prisoners or other persons.

78. If prisoners of war, having given no pledge nor made any promise on their honor, forcibly or otherwise escape, and are captured again in battle, after having rejoined their own army, they shall not be punished for their escape, but shall be treated as simple prisoners of war, although they will be subjected to stricter confinement.

79. Every captured wounded enemy shall be medically treated, according to the ability of the medical staff.

80. Honorable men, when captured, will abstain from giving to the enemy information concerning their own army, and the modern law of war permits no longer the use of any violence against prisoners, in order to extort the desired information, or to punish them for having given false information.

SECTION IV.—PARTISANS—ARMED ENEMIES NOT BELONG-
ING TO THE HOSTILE ARMY—SCOUTS—ARMED
PROWLERS—WAR-REBELS.

81. Partisans are soldiers armed and wearing the uniform of their army, but belonging to a corps which acts detached from the main body for the purpose of making inroads into the territory occupied by the enemy. If captured, they are entitled to all the privileges of the prisoner of war.

82. Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers—such men, or squads of men, are not public enemies, and therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.

83. Scouts or single soldiers, if disguised in the dress of the country, or in the uniform of the army hostile to their own, employed in obtaining information, if found within or lurking about the lines of the captor are treated as spies, and suffer death.

84. Armed prowlers, by whatever names they may be called, or persons of the enemy's territory, who steal within the lines of the hostile army, for the purpose of robbing, killing, or of destroying bridges, roads or canals, or of robbing or destroying the mail, or of cutting the telegraph wires, are not entitled to the privileges of the prisoner of war.

85. War-rebels are persons within an occupied territory who rise in arms against the occupying or conquering army, or against the authorities established by the same. If captured, they may suffer death, whether they rise singly, in small or large bands, and whether called upon to do so by their own, but expelled, government or not. They are not prisoners of war; nor are they, if discovered and secured before their conspiracy has matured to an actual rising, or to armed violence.

SECTION V.—SAFE-CONDUCT—SPIES—WAR-TRAITORS
—CAPTURED MESSENGERS—ABUSE OF
THE FLAG OF TRUCE.

86. All intercourse between the territories occupied by belligerent armies, whether by traffic, by letter, by travel, or in any other way, ceases. This is the general rule, to be observed without special proclamation.

Exceptions to this rule, whether by safe-conduct, or permission to trade on a small or large scale, or by exchanging mails, or by travel from one territory into the other, can take place only according to agreement approved by the government, or by the highest military authority.

Contraventions of this rule are highly punishable.

87. Ambassadors, and all other diplomatic agents of neutral powers, accredited to the enemy, may receive safe conducts through the territories occupied by the belligerents, unless there are military reasons to the contrary, and unless they may reach the place of their destination conveniently by another route. It implies no international affront if the safe conduct is declined. such passes are usually given by the supreme authority of the state, and not by subordinate officers.

88. A spy is a person who secretly, in disguise or under false pretence, seeks information with the intention of communicating it to the enemy.

The spy is punishable with death by hanging by the neck, whether or not he succeeded in obtaining the information or in conveying it to the enemy.

89. If a citizen of the United States obtains information in a legitimate manner, and betrays it to the enemy, be he a military or civil officer, or a private citizen, he shall suffer death.

90. A traitor under the law of war, or a war-traitor, is a person in a place or district under martial law who, unauthorized by the military commander, gives information of any kind to the enemy, or holds intercourse with him.

91. The war-traitor is always severely punished. If his offence consists in betraying to the enemy anything concerning the condition, safety, operations or plans of the troops holding or occupying the place or district, his punishment is death.

92. If the citizen or subject of a country or place invaded or conquered gives information to his own government, from which he is separated by the hostile army, or to the army of his government, he is a war-traitor, and death is the penalty of his offence.

93. All armies in the field stand in need of guides, and impress them if they cannot obtain them otherwise.

94. No person having been forced by the enemy to serve as guide is punishable for having done so.

95. If a citizen of a hostile and invaded district voluntarily serves as a guide to the enemy, or offers to do so, he is deemed a war-traitor, and shall suffer death.

96. A citizen serving voluntarily as a guide against his own country commits treason, and will be dealt with according to the law of his country.

97. Guides, when it is clearly proved that they have misled intentionally, may be put to death.

98. All unauthorized or secret communication with the enemy is considered treasonable by the law of war.

Foreign residents in an invaded or occupied territory, or foreign visitors in the same, can claim no immunity from this law. They may communicate with foreign parts, or with the inhabitants of the hostile country, so far as the military authority permits, but no further. Instant expulsion from the occupied territory would be the very least punishment for the infraction of this rule.

99. A messenger carrying written dispatches or verbal messages from one portion of the army, or from a besieged place, to another portion of the same army, or its government, if armed, and in the uniform of his army, and if captured while doing so, in the territory occupied by the enemy, is treated by the captor as a prisoner of war. If not in uniform, nor a soldier, the circumstances connected with his capture must determine the disposition that shall be made of him.

100. A messenger or agent who attempts to steal through the territory occupied by the enemy, to further, in any manner, the interests of the enemy, if captured, is not entitled to the privileges of the prisoner of war, and may be dealt with according to the circumstances of the case.

101. While deception in war is admitted as a just and necessary means of hostility, and is consistent with honorable warfare, the common law of war allows even capital punishment for clandestine or treacherous attempts to injure an enemy, because they are so dangerous, and it is so difficult to guard against them.

102. The law of war, like the criminal law regarding other offences, makes no difference on account of the difference of sexes, concerning the spy, the war-traitor, or the war-rebel.

103. Spies, war-traitors, and war-rebels, are not exchanged according to the common law of war. The exchange of such persons would require a special cartel, authorized by the government, or, at a great distance from it, by the chief commander of the army in the field.

104. A successful spy or war-traitor, safely returned to his own army, and afterwards captured as an enemy, is not subject to punishment for his acts as a spy or war-traitor, but he may be held in closer custody as a person individually dangerous.

SECTION VI.—EXCHANGE OF PRISONERS—FLAGS OF TRUCE —FLAGS OF PROTECTION.

105. Exchanges of prisoners take place—number for number—rank for rank—wounded for wounded—with added condition for added condition—such, for instance, as not to serve for a certain period.

106. In exchanging prisoners of war, such numbers of persons of inferior rank may be substituted as an equivalent for one of superior rank as may be agreed upon by cartel, which requires the sanc-

tion of the government, or of the commander of the army in the field.

107. A prisoner of war is in honor bound truly to state to the captor his rank; and he is not to assume a lower rank than belongs to him, in order to cause a more advantageous exchange; nor a higher rank, for the purpose of obtaining better treatment.

Offenses to the contrary have been justly punished by the commanders of released prisoners, and may be good cause for refusing to release such prisoners.

108. The surplus number of prisoners of war remaining after an exchange has taken place is sometimes released either for the payment of a stipulated sum of money, or, in urgent cases of provision, clothing, or other necessities.

Such arrangement, however, requires the sanction of the highest authority.

109. The exchange of prisoners of war is an act of convenience to both belligerents. If no general cartel has been concluded, it can not be demanded by either of them. No belligerent is obliged to exchange prisoners of war.

A cartel is voidable so soon as either party has violated it.

110. No exchange of prisoners shall be made except after complete capture, and after an accurate account of them, and a list of the captured officers, has been taken.

111. The bearer of a flag of truce cannot insist upon being admitted. He must always be admitted with great caution. Unnecessary frequency is carefully to be avoided.

112. If the bearer of a flag of truce offer himself during an engagement, he can be admitted as a very rare exception only. It is no breach of good faith to retain such a flag of truce, if admitted during the engagement. Firing is not required to cease on the appearance of a flag of truce in battle.

113. If the bearer of a flag of truce, presenting himself during an engagement, is killed or wounded, it furnishes no ground of complaint whatever.

114. If it be discovered, and fairly proved, that a flag of truce has been abused for surreptitiously obtaining military knowledge, the bearer of the flag thus abusing his sacred character is deemed a spy.

So sacred is the character of a flag of truce, and so necessary is its sacredness, that while its abuse is an especially heinous offence, great caution is requisite, on the other hand, in convicting the bearer of a flag of truce as a spy.

115. It is customary to designate by certain flags (usually yellow), the hospitals in places which are shelled, so that the besieging enemy may avoid firing on them. The same has been done in battles, when hospitals are situated within the field of the engagement.

116. Honorable belligerents often request that the hospitals with-

in the territory of the enemy may be designated, so that they may be spared.

An honorable belligerent allows himself to be guided by flags or signals of protection as much as the contingencies and the necessities of the fight will permit.

117. It is justly considered an act of bad faith, of infamy or fiendishness, to deceive the enemy by flags of protection. Such act of bad faith may be good cause for refusing to respect such flags.

118. The besieging belligerent has sometimes requested the besieged to designate the buildings containing collections of works of art, scientific museums, astronomical observatories, or precious libraries, so that their destruction may be avoided as much as possible.

SECTION VII.—THE PAROLE.

119. Prisoners of war may be released from captivity by exchange, and, under certain circumstances, also by parole.

120. The term parole designates the pledge of individual good faith and honor to do, or to omit doing, certain acts after he who gives his parole shall have been dismissed, wholly or partially, from the power of the captor.

121. The pledge of the parole is always an individual but not a private act.

122. The parole applies chiefly to prisoners of war whom the captor allows to return to their country, or to live in greater freedom within the captor's country or territory, on conditions stated in the parole.

123. Release of prisoners of war by exchange is the general rule; release by parole is the exception.

124. Breaking the parole is punished with death when the person breaking the parole is captured again.

Accurate lists, therefore, of the paroled persons must be kept by the belligerents.

125. When paroles are given and received, there must be an exchange of two written documents, in which the name and rank of the paroled individuals are accurately and truthfully stated.

126. Commissioned officers only are allowed to give their parole, and they can give it only with the permission of their superior, as long as a superior in rank is within reach.

127. No non-commissioned officer or private can give his parole except through an officer. Individual paroles not given through an officer are not only void, but subject the individual giving them to the punishment of death as deserters. The only admissible exception is where individuals, properly separated from their commands, have suffered long confinement without the possibility of being paroled through an officer.

128. No paroling on the battle-field, no paroling of entire bodies of troops after a battle, and no dismissal of large numbers of pris-

oners, with a general declaration that they are paroled, is permitted, or of any value.

129. In capitulations for the surrender of strong places or fortified camps, the commanding officer, in cases of urgent necessity, may agree that the troops under his command shall not fight again during the war, unless exchanged.

130. The usual pledge given in the parole is not to serve during the existing war, unless exchanged.

This pledge refers only to the active service in the field, against the paroling belligerent or his allies actively engaged in the same war. These cases of breaking the parole are patent acts, and can be visited with the punishment of death; but the pledge does not refer to internal service, such as recruiting or drilling the recruits, fortifying places not besieged, quelling civil commotions, fighting against belligerents unconnected with the paroling belligerents, or to civil or diplomatic service for which the paroled officer may be employed.

131. If the government does not approve of the parole, the paroled officer must return into captivity; and should the enemy refuse to receive him, he is free of his parole.

132. A belligerent government may declare, by a general order, whether it will allow paroling, and on what conditions it will allow it. Such order is communicated to the enemy.

133. No prisoner of war can be forced by the hostile government to parole himself, and no government is obliged to parole prisoners of war, or to parole all captured officers if it paroles any. As the pledging of the parole is an individual act, so is paroling, on the other hand, an act of choice on the part of the belligerent.

134. The commander of an occupying army may require of the civil officers of the enemy, and of its citizens, any pledge he may consider necessary for the safety or security of his army; and upon their failure to give it, he may arrest, confine, or detain them.

SECTION VIII.—ARMISTICE—CAPITULATION.

135. An armistice is the cessation of active hostilities for a period agreed upon between belligerents. It must be agreed upon in writing, and duly ratified by the highest authorities of the contending parties.

136. If an armistice be declared, without conditions, it extends no further than to require a total cessation of hostilities along the front of both belligerents.

If conditions be agreed upon, they should be clearly expressed, and must be rigidly adhered to by both parties. If either party violates any express condition, the armistice may be declared null and void by the other.

137. An armistice may be general, and valid for all points and lines of the belligerents; or special—that is, referring to certain troops or certain localities only.

An armistice may be concluded for a definite time; or for an indefinite time, during which either belligerent may resume hostilities on giving the notice agreed upon to the other.

138. The motives which induce the one or the other belligerent to conclude an armistice, whether it be expected to be preliminary to a treaty of peace, or to prepare during the armistice for a more vigorous prosecution of the war, do in no way affect the character of the armistice itself.

139. An armistice is binding upon the belligerents from the day of the agreed commencement; but the officers of the armies are responsible from the day only when they receive official information of its existence.

140. Commanding officers have the right to conclude armistices binding on the district over which their command extends; but such armistice is subject to the ratification of the superior authority, and ceases so soon as it is made known to the enemy that the armistice is not ratified, even if a certain time for the elapsing between giving notice of cessation and the resumption of hostilities should have been stipulated for.

141. It is incumbent upon the contracting parties of an armistice to stipulate what intercourse of persons or traffic between the inhabitants of the territories occupied by the hostile armies shall be allowed, if any.

If nothing is stipulated, the intercourse remains suspended, as during actual hostilities.

142. An armistice is not a partial or a temporary peace; it is only the suspension of military operations to the extent agreed upon by the parties.

143. When an armistice is concluded between a fortified place and the army besieging it, it is agreed by all the authorities on this subject that the besieger must cease all extension, perfection, or advance of his attacking works, as much so as from attacks by main force.

But as there is a difference of opinion among martial jurists, whether the besieged have the right to repair breaches or to erect new works of defence within the place during an armistice, this point should be determined by express agreement between the parties.

144. So soon as a capitulation is signed, the capitulator has no right to demolish, destroy, or injure the works, arms, stores, or ammunition, in his possession, during the time which elapses between the signing and the execution of the capitulation, unless otherwise stipulated in the same.

145. When an armistice is clearly broken by one of the parties, the other party is released from all obligations to observe it.

146. Prisoners, taken in the act of breaking an armistice, **must** be treated as prisoners of war, the officer alone being responsible who gives the order for such a violation of an armistice. The highest authority of the belligerent aggrieved may demand redress for the infraction of an armistice.

147. Belligerents sometimes conclude an armistice while their plenipotentiaries are met to discuss the conditions of a treaty of peace; but plenipotentiaries may meet without a preliminary armistice: in the latter case, the war is carried on without any abatement.

SECTION IX.—ASSASSINATION.

148. The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such international outlawry; on the contrary, it abhors such outrage. The sternest retaliation should follow the murder committed in consequence of such proclamation, made by whatever authority. Civilized nations look with horror upon offers of rewards for the assassination of enemies, as relapses into barbarism.

SECTION X.—INSURRECTION—CIVIL WAR—REBELLION.

149. Insurrection is the rising of people in arms against their government, or a portion of it, or against one or more of its laws, or against an officer or officers of the government. It may be confined to mere armed resistance, or it may have greater ends in view.

150. Civil war is war between two or more portions of a country or state, each contending for the mastery of the whole, and each claiming to be the legitimate government. The term is also sometimes applied to war of rebellion, when the rebellious provinces or portions of the state are contiguous to those containing the seat of government.

151. The term rebellion is applied to an insurrection of large extent, and is usually a war between the legitimate government of a country and portions or provinces of the same who seek to throw off their allegiance to it, and set up a government of their own.

152. When humanity induces the adoption of the rules of regular war toward rebels, whether the adoption is partial or entire, it does in no way whatever imply a partial or complete acknowledgment of their government, if they have set up one, or of them, as an independent or sovereign power. Neutrals have no right to make the adoption of the rules of war by the assailed government toward rebels the ground of their own acknowledgment of the revolted people as an independent power.

153. Treating captured rebels as prisoners of war, exchanging them, concluding of cartels, capitulations, or other warlike agree-

ments with them; addressing officers of a rebel army by the rank they may have in the same; accepting flags of truce; or, on the other hand, proclaiming martial law in their territory, or levying war-taxes or forced loans, or doing any other act sanctioned or demanded by the law and usages of public war between sovereign belligerents, neither proves nor establishes an acknowledgment of the rebellious people, or of the government which they may have erected, as a public or sovereign power. Nor does the adoption of the rules of war toward rebels imply an engagement with them extending beyond the limits of these rules. It is victory in the field that ends the strife, and settles the future relations between the contending parties.

154. Treating, in the field, the rebellious enemy according to the law and usages of war, has never prevented the legitimate government from trying the leaders of the rebellion or chief rebels for high treason, and from treating them accordingly, unless they are included in a general amnesty.

155. All enemies in regular war are divided into two general classes; that is to say, into combatants and noncombatants, or unarmed citizens of the hostile government.

The military commander of the legitimate government, in a war of rebellion, distinguishes between the loyal citizen in the revolted portion of the country and the disloyal citizen. The disloyal citizens may further be classified into those citizens known to sympathize with the rebellion, without positively aiding it, and those who, without taking up arms, give positive aid and comfort to the rebellious enemy, without being bodily forced thereto.

156. Common justice and plain expediency require that the military commander protect the manifestly loyal citizens, in revolted territories, against the hardships of the war, as much as the common misfortune of all war admits.

The commander will throw the burden of the war, as much as lies within his power, on the disloyal citizens of the revolted portion or province, subjecting them to a stricter police than the noncombatant enemies have to suffer in regular war; and if he deems it appropriate, or if his government demands of him, that every citizen shall, by an oath of allegiance, or by some other manifest act, declare his fidelity to the legitimate government, he may expel, transfer, imprison, or fine the revolted citizens who refuse to pledge themselves anew as citizens obedient to the law, and loyal to the government.

Whether it is expedient to do so, and whether reliance can be placed upon such oaths, the commander or his government have the right to decide.

157. Armed or unarmed resistance by citizens of the United States against the lawful movements of their troops, is levying war against the United States, and is therefore treason.

APPENDIX III

CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED IN ARMIES IN THE FIELD. GENEVA, JULY 6, 1906

[Names of States.]

Being equally animated by the desire to lessen the inherent evils of warfare as far as is within their power, and wishing for this purpose to improve and supplement the provisions agreed upon at Geneva on August 22, 1864, for the amelioration of the condition of the wounded in armies in the field,

Have decided to conclude a new convention to that effect, and have appointed as their plenipotentiaries, to wit:

[Names of delegates.]

Who, after having communicated to each other their full powers, found in good and due form, have agreed on the following:

[Translation.]

CHAPTER I.—THE SICK AND WOUNDED.

Article 1. Officers, soldiers, and others persons officially attached to armies who are sick or wounded shall be respected and cared for, without distinction of nationality, by the belligerent in whose power they are.

A belligerent, however, when compelled to leave his wounded in the hands of his adversary, shall leave with them, so far as military conditions permit, a portion of the personnel and matériel of his sanitary service to assist in caring for them.

Art. 2. Subject to the care that must be taken of them under the preceding article, the sick and wounded of an Army who fall into the power of the other belligerent become prisoners of war, and the general rules of international law in respect to prisoners become applicable to them.

The belligerents remain free, however, to mutually agree upon such clauses, by way of exception or favor, in regard to sick and wounded prisoners as they may deem proper. They shall have authority to agree:

1. To mutually return the sick and wounded left on the field of battle after an engagement.

2. To send back to their own country the sick and wounded who have recovered, or who are in a condition to be transported, and whom they do not desire to retain as prisoners.

3. To send the sick and wounded of the enemy to a neutral state, with its consent and on condition that it shall charge itself with their interment until the close of hostilities.

Art. 3. After every engagement the belligerent who remains in possession of the field of battle shall take measures to search for the wounded and to protect the wounded and dead from spoliation and ill treatment.

He will see that a careful examination is made of the bodies of the dead prior to their interment or incineration.

Art. 4. As soon as possible each belligerent shall forward to the authorities of their country or Army the military tokens, or badges of identification, found upon the bodies of the dead, together with a list of the sick and wounded taken in charge by him.

Belligerents will keep each other mutually advised of interments and transfers, together with admissions to hospitals and deaths which occur among the sick and wounded in their hands. They will collect all personal belongings, valuables, letters, etc., which are found upon the field of battle, or have been left by the sick or wounded, or by those who have died in sanitary formations or other establishments, for transmission to interested persons through the authorities of their own country.

Art. 5. Military authority may make an appeal to the charitable zeal of the inhabitants to receive and, under his supervision, to care for the sick and wounded of the armies, by granting to persons responding to such appeals special protection and certain immunities.

CHAPTER II.—SANITARY FORMATIONS AND ESTABLISHMENTS.

Art. 6. Movable sanitary formations (i. e., those which are intended to accompany armies in the field) and the fixed establishments belonging to the sanitary service shall be protected and respected by belligerents.

Art. 7. The protection due to sanitary formations and establishments ceases if they are used to commit acts injurious to the enemy.

Art. 8. A sanitary formation or establishment shall not be deprived of the protection accorded by article 6 by the fact that:

1. The personnel of a formation or establishment is armed and uses its arms in self-defense or in defense of its sick and wounded.

2. In the absence of armed hospital attendants, the formation is guarded by an armed detachment or by sentinels regularly established.

3. Arms or cartridges, taken from the wounded and not yet turned over to the proper authorities, are found in the formation or establishment.

CHAPTER III.—PERSONNEL.

Art. 9. The personnel exclusively charged with the removal, transportation, and treatment of the sick and wounded, as well as with the administration of sanitary formations and establishments, and the chaplains attached to armies shall be respected and protected under all circumstances. If they fall into the hands of the enemy they shall not be regarded as prisoners of war.

These provisions apply to the personnel of the guard of sanitary formations and establishments in the case provided for in section 2 of article 8.

Art. 10. The personnel of volunteer aid societies, duly recognized and authorized by their respective governments, who are employed in the sanitary formations and establishments of armies, are assimilated to the personnel contemplated in the preceding article, upon condition that the said personnel shall be subject to military laws and regulations.

Each state shall make known to the other either in time of peace or at the opening or during the progress of hostilities—in any case, before actual employment—the names of the societies which it has authorized to render assistance, under its responsibility, in the official sanitary service of its armies.

Art. 11. A recognized society of a neutral state can not lend the services of its sanitary personnel and formations to a belligerent except with the prior consent of its own government and the authority of such belligerent. The belligerent who has accepted such assistance is required to notify the enemy before making any use thereof.

Art. 12. Persons described in articles 9, 10, and 11 will continue in the exercise of their functions after they have fallen into the power of the enemy and under his direction.

When their co-operation is no longer indispensable they will be sent back to their army or country, within such period and by such route as may accord with military necessity.

They will carry with them such effects, instruments, arms, and horses as are their private property.

Art. 13. While they remain in his power, the enemy will secure to the personnel mentioned in article 9 the same pay and allowances to which persons of the same grade in his own Army are entitled.

CHAPTER IV.—MATÉRIEL.

Art. 14. Mobile sanitary formations that have fallen into the power of the enemy shall retain their matériel and means of transportation of whatever kind, including teams, whatever may be the means of transportation, and the conducting personnel.

Competent military authority, however, shall have the right to employ them in caring for the sick and wounded. The restitution

of the matériel shall take place in accordance with the conditions prescribed for the sanitary personnel, and, as far as possible, at the same time.

Art. 15. Buildings and matériel pertaining to fixed establishments shall remain subject to the laws of war, but can not be diverted from their use so long as they are necessary for the sick and wounded. Commanders of troops engaged in operations, however, may use them in case of important military necessity, if before such use, the sick and wounded who are in them have been provided for.

Art. 16. The matériel of aid societies, admitted to the benefits of this convention in conformity to the conditions herein prescribed, is regarded as private property and, as such, will be respected under all circumstances, save that it is subject to the right of requisition by belligerents in conformity to the laws and usages of war.

CHAPTER V.—CONVOYS OF EVACUATION.

Art. 17. Convoys of evacuation shall be treated as movables sanitary formations with the following exceptions:

1. A belligerent intercepting a convoy may, if required by military necessity, break up such convoy by charging himself with the care of the sick and wounded whom it contain.

2. In this case the obligation to restore the sanitary personnel, as provided for in article 12, shall be extended to include the entire military personnel employed, under proper authority, in the transportation and protection of the convoy.

The obligation to return the sanitary matériel as provided for in article 14 shall apply to railway trains and vessels intended for interior navigation which have been especially equipped for evacuation purposes, together with the equipment of such vehicles, trains, and vessels which belong to the sanitary service.

Military vehicles, with their teams, other than those belonging to the sanitary service, may be captured.

Civilians and various means of transportation obtained by requisition, including railway matériel and vessels utilized for convoys, are subject to the general rules of international law.

CHAPTER VI.—DISTINCTIVE EMBLEM.

Art. 18. In homage to Switzerland the heraldic sign of the red cross on a white ground, formed by the reversal of the federal colors, is continued as the emblem and distinctive sign of the sanitary service of armies.

Art. 19. This emblem appears on flags and brassards as well as upon all matériel appertaining to the sanitary service, with the permission of competent military authority.

Art. 20. The personnel protected by the provisions of paragraph 1, article 9, and articles 10 and 11 will wear attached to the left

arm a brassard bearing a red cross on a white ground, which will be issued and stamped by competent military authority, and accompanied by a certificate of identity in the case of persons attached to the sanitary service of armies who do not have military uniform.

Art. 21. The distinctive flag of the convention can only be displayed, with the consent of the military authorities over sanitary formations and establishments which the convention provides shall be respected, and with the consent of the military authorities. It shall be accompanied by the national flag of the belligerent to whose service the formation or establishment is attached.

Sanitary formations which have fallen into the power of the enemy, however, shall fly no other flag than that of the Red Cross so long as they continue in that situation.

Art. 22. Neutral sanitary formations which, under the conditions set forth in article 11, have been authorized to render their services shall fly, with the flag of the convention, the national flag of the belligerent to which they are attached. The provisions of the second paragraph of the preceding article are applicable to them.

Art. 23. The emblem of the red cross on a white ground and the words Red Cross or Geneva Cross may only be used, whether in time of peace or war, to protect or designate sanitary formations and establishments, the personnel and matériel protected by the convention.

CHAPTER VII.—APPLICATION AND EXECUTION OF THE CONVENTION.

Art. 24. The provisions of the present convention are obligatory on the contracting powers only, in case of war between two or more of them. The said provisions shall cease to be obligatory from the time when one of the belligerent powers should not be signatory to the convention.

Art. 25. The commanders in chief of the belligerent armies shall have to provide for the details of execution of the foregoing articles, as well as for unforeseen cases, in accordance with the instructions of their respective governments, and conformably to the general principles of this convention.

Art. 26. The signatory governments shall take the necessary steps to acquaint their troops, and particularly the protected personnel, with the provisions of this convention and to make them known to the people at large.

CHAPTER VIII.—REPRESSION OF ABUSES AND INFRACTIONS.

Art. 27. The signatory powers whose legislation should not now be adequate engage to take or recommend to their legislatures such measures as may be necessary to prevent the use, by private per-

sons or by societies other than those upon which this convention confers the right thereto, of the emblem or name of the Red Cross or Geneva Cross, particularly for commercial purposes by means of trade marks or commercial labels.

The prohibition of the use of the emblem or name in question shall take effect from the time set by each act of legislation and not later than five years after this convention goes into effect. Upon the said going into effect, it shall be unlawful to use a trade mark or commercial label contrary to such prohibition.

Art. 28. In the event of their military penal laws being insufficient, the signatory governments also engage to take, or to recommend to their legislatures, the necessary measures to repress, in time of war, individual acts of pillage and ill treatment of the sick and wounded of the armies, as well as to punish, as usurpations of military insignia, the wrongful use of the flag and brassard of the Red Cross by military persons or private individuals not protected by the present convention.

They will communicate to each other through the Swiss Federal Council the measures taken with a view to such repression, not later than five years from the ratification of the present convention.

GENERAL PROVISIONS.

Art. 29. The present convention shall be ratified as soon as possible. The ratifications will be deposited at Berne.

A record of the deposit of each act of ratification shall be prepared, of which a duly certified copy shall be sent, through diplomatic channels, to each of the contracting powers.

Art. 30. The present convention shall become operative, as to each power, six months after the date of deposit of its ratification.

Art. 31. The present convention, when duly ratified, shall supersede the Convention of August 22, 1864, in the relations between the contracting states.

The Convention of 1864 remains in force in the relations between the parties who signed it but who should not also ratify the present convention.

Art. 32. The present convention may, until December 31, proximo, be signed by the powers represented at the conference which opened at Geneva on June 11, 1906, as well as by the powers not represented at the conference who have signed the Convention of 1864.

Such of the powers as shall not have signed the present convention on or before December 31, 1906, will remain at liberty to accede to it after that date. They shall signify their adhesion in a written notification addressed to the Swiss Federal Council, and communicated to all the contracting powers by the said Council.

Other powers may request to adhere in the same manner, but their request shall only be effective if, within the period of one year from its notification to the Federal Council, such Council has

not been advised of any opposition on the part of any of the contracting powers.

Art. 33. Each of the contracting parties shall have the right to denounce the present convention. This denunciation shall only become operative one year after a notification in writing shall have been made to the Swiss Federal Council, which shall forthwith communicate such notification to all the other contracting parties.

This denunciation shall only become operative in respect to the power which has given it.

In faith whereof the plenipotentiaries have signed the present convention and affixed their seals thereto.

Done at Geneva, the sixth day of July, one thousand nine hundred and six, in a single copy, which shall remain in the archives of the Swiss Confederation and certified copies of which shall be delivered through the diplomatic channel to the contracting parties.

[Here follow the signatures.]

APPENDIX IV

HAGUE CONVENTIONS.

FINAL ACT OF THE SECOND INTERNATIONAL PEACE CONFERENCE.¹

The Second International Peace Conference, proposed in the first instance by the President of the United States of America, having been convoked, on the invitation of His Majesty the Emperor of All the Russias, by Her Majesty the Queen of the Netherlands, assembled on the 15th June, 1907, at The Hague, in the Hall of the Knights, for the purpose of giving a fresh development to the humanitarian principles which served as a basis for the work of the First Conference of 1899.

The following Powers took part in the Conference, and appointed the Delegates named below:

[Names of forty-four states and delegates.]

At a series of meetings, held from the 15th June to the 18th October, 1907, in which the above Delegates were throughout animated by the desire to realize, in the fullest possible measure, the generous views of the august initiator of the Conference and the in-

¹ *Introductory Note.*

The Second International Peace Conference was held at The Hague from June 15 to October 18, 1907.

Forty-four states signed the conventions, with or without reservations. The states, in alphabetical order of names in the French language, are: Germany, United States of America, Argentina, Austria-Hungary, Belgium, Bolivia, Brazil, Bulgaria, Chile, China, Colombia, Cuba, Denmark, Dominican Republic, Ecuador, Spain, France, Great Britain, Greece, Guatemala, Haiti, Italy, Japan, Luxembourg, Mexico, Montenegro, Nicaragua, Norway, Panama, Paraguay, Netherlands, Peru, Persia, Portugal, Roumania, Russia, Salvador, Servia, Siam, Sweden, Switzerland, Turkey, Uruguay, and Venezuela.

The delegates from the United States were Joseph H. Choate, Horace Porter, Uriah M. Rose, David Jayne Hill, Charles S. Sperry, George B. Davis, William I. Buchanan, James Brown Scott, and Charles Henry Butler.

The Conference drew up thirteen conventions and one declaration. The conventions were to bear date of October 18, 1907, and the states represented might sign up to June 30, 1908.

To avoid unnecessary repetition, the names of the states and of the delegates are omitted in reproducing the text of these conventions. In

tentions of their Governments, the Conference drew up for submission for signature by the Plenipotentiaries, the text of the Conventions and of the Declaration enumerated below and annexed to the present Act:

1. Convention for the Pacific Settlement of International Disputes.
2. Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts.
3. Convention Relative to the Opening of Hostilities.
4. Convention Respecting the Laws and Customs of War on Land.
5. Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land.
6. Convention Relative to the Status of Enemy Merchant-Ships at the Outbreak of Hostilities.
7. Convention Relative to the Conversion of Merchant-Ships into War-Ships.
8. Convention Relative to the Laying of Automatic Submarine Contact Mines.
9. Convention Respecting Bombardment by Naval Forces in Time of War.
10. Convention for the Adaptation to Naval War of the Principles of the Geneva Convention.
11. Convention Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War.
12. Convention Relative to the Creation of an International Prize Court.
13. Convention Concerning the Rights and Duties of Neutral Powers in Naval War.
14. Declaration Prohibiting the Discharge of Projectiles and Explosives from Balloons.

These Conventions and Declaration shall form so many separate Acts. These Acts shall be dated this day, and may be signed up

certain cases the substance of the conventions is inserted in the text and is not reprinted in the appendices.

The articles as to ratification and denunciation are in the main similar. These are printed in the First Convention, articles xcii-xcvii. (Article xciv applies particularly to the First Convention.) The articles as to ratification are omitted in the text of other conventions, unless there are clauses not generally applicable.

The translation is in substance that submitted to the United States Senate by the Secretary of State in Document No. 444, 60th Congress, 1st Session, 1908. The French text is the official text, and may be found in British Parliamentary Papers, Miscellaneous, No. 1 (1908), Cd. 3857, in Supplement, American Journal of International Law, Vol. 2, Nos. 1 and 2, 1908, Scott, Texts of the Peace Conferences at The Hague, 1899 and 1907, and Higgins, The Hague Peace Conferences.

Discussions of the several conventions agreed upon at The Hague in 1907 can be found in the American Journal of International Law, Vol. 2, 1908.

to the 30th June, 1908, at The Hague, by the Plenipotentiaries of the Powers represented at the Second Peace Conference.

The Conference, actuated by the spirit of mutual agreement and concession characterizing its deliberations, has agreed upon the following Declaration, which, while reserving to each of the Powers represented full liberty of action as regards voting, enables them to affirm the principles which they regard as unanimously admitted:

It is unanimous—

1. In admitting the principle of compulsory arbitration.
2. In declaring that certain disputes, in particular those relating to the interpretation and application of the provisions of International Agreements, may be submitted to compulsory arbitration without any restriction.

Finally, it is unanimous in proclaiming that, although it has not yet been found feasible to conclude a Convention in this sense, nevertheless the divergences of opinion which have come to light have not exceeded the bounds of judicial controversy, and that, by working together here during the past four months, the collected Powers not only have learnt to understand one another and to draw closer together, but have succeeded in the course of this long collaboration in evolving a very lofty conception of the common welfare of humanity.

The Conference has further unanimously adopted the following Resolution:

"The Second Peace Conference confirms the Resolution adopted by the Conference of 1899 in regard to the limitation of military expenditure; and inasmuch as military expenditure has considerably increased in almost every country since that time, the Conference declares that it is eminently desirable that the Governments should resume the serious examination of this question."

It has besides expressed the following opinions:

1. The Conference calls the attention of the Signatory Powers to the advisability of adopting the annexed draft Convention for the creation of a Judicial Arbitration Court, and of bringing it into force as soon as an agreement has been reached respecting the selection of the Judges and the constitution of the Court.
2. The Conference expresses the opinion that, in case of war, the responsible authorities, civil as well as military, should make it their special duty to ensure and safeguard the maintenance of pacific relations, more especially of the commercial and industrial relations between the inhabitants of the belligerent States and neutral countries.
3. The Conference expresses the opinion that the Powers should regulate, by special Treaties, the position as regards military charges, of foreigners residing within their territories.

4. The Conference expresses the opinion that the preparation of regulations relative to the laws and customs of naval war should figure in the programme of the next Conference, and that in any case the Powers may apply, as far as possible, to war by sea the principles of the Convention Relative to the Laws and Customs of War on Land.

Finally, the Conference recommends to the Powers the assembly of a Third Peace Conference, which might be held within a period corresponding to that which has elapsed since the preceding Conference, at a date to be fixed by common agreement between the Powers, and it calls their attention to the necessity of preparing the programme of this Third Conference a sufficient time in advance to ensure its deliberations being conducted with the necessary authority and expedition.

In order to attain this object the Conference considers that it would be very desirable that, some two years before the probable date of the meeting, a preparatory Committee should be charged by the Governments with the task of collecting the various proposals to be submitted to the Conference, of ascertaining what subjects are ripe for embodiment in an International Regulation, and of preparing a programme which the Governments should decide upon in sufficient time to enable it to be carefully examined by the countries interested. The Committee should further be intrusted with the task of proposing a system of organization and procedure for the Conference itself.

In faith whereof the Plenipotentiaries have signed the present Act and have affixed their seals thereto.

Done at The Hague, the 18th October, 1907, in a single copy, which shall remain deposited in the archives of the Netherland Government, and duly certified copies of which shall be sent to all the Powers represented at the Conference.

CONVENTION FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES.

His Majesty the German Emperor, King of Prussia; the President of the United States of America; the President of the Argentine Republic; His Majesty the Emperor of Austria, King of Bohemia, etc., and Apostolic King of Hungary; His Majesty the King of the Belgians; the President of the Republic of Bolivia; the President of the Republic of the United States of Brazil; His Royal Highness the Prince of Bulgaria; the President of the Republic of Chile; His Majesty the Emperor of China; the President of the Republic of Colombia; the Provisional Governor of the Republic of Cuba; His Majesty the King of Denmark; the President of the Dominican Republic; the President of the Republic of Ecuador; His Majesty the King of Spain; the President of the French Republic; His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India; His Majesty the King of the Hellenes; the President of the Republic of Guatemala; the President of the Republic of Haïti; His Majesty the King of Italy; His Majesty the Emperor of Japan; His Royal Highness the Grand Duke of Luxemburg, Duke of Nassau; the President of the United States of Mexico; His Royal Highness the Prince of Montenegro; the President of the Republic of Nicaragua; His Majesty the King of Norway; the President of the Republic of Panamá; the President of the Republic of Paraguay; Her Majesty the Queen of the Netherlands; the President of the Republic of Peru; His Imperial Majesty the Shah of Persia; His Majesty the King of Portugal and of the Algarves, etc.; His Majesty the King of Roumania; His Majesty the Emperor of All the Russias; the President of the Republic of Salvador; His Majesty the King of Servia; His Majesty the King of Siam; His Majesty the King of Sweden; the Swiss Federal Council; His Majesty the Emperor of the Ottomans; the President of the Oriental Republic of Uruguay; the President of the United States of Venezuela—

Animated by the sincere desire to work for the maintenance of the general peace;

Resolved to promote by all the efforts in their power the friendly settlement of international disputes;

Recognizing the solidarity which unites the members of the society of civilized nations;

Desirous of extending the empire of law, and of strengthening the appreciation of international justice;

Convinced that the permanent institution of a Tribunal of Arbitra-

tion, accessible to all, in the midst of the independent Powers, will contribute effectively to this result;

Having regard to the advantages attending the general and regular organization of the procedure of arbitration;

Sharing the opinion of the august Initiator of the International Peace Conference that it is expedient to record in an international Agreement the principles of equity and right on which are based the security of States and the welfare of peoples;

Being desirous, with this object, of insuring the better working in practice of Commissions of Inquiry and Tribunals of Arbitration, and of facilitating recourse to arbitration in cases which allow of a summary procedure;

Have deemed it necessary to revise in certain particulars and to complete the work of the First Peace Conference for the pacific settlement of international disputes.

The High Contracting Parties have resolved to conclude a new Convention for this purpose, and have appointed the following as their Plenipotentiaries:

[Names of Plenipotentiaries.]

Who, after having deposited their full powers, found in good and due form, have agreed upon the following:

TITLE I.—ON THE MAINTENANCE OF THE GENERAL PEACE.

Article 1. With a view to obviating, as far as possible, recourse to force in the relations between States, the Contracting Powers agree to use their best efforts to insure the pacific settlement of international differences.

TITLE II.—ON GOOD OFFICES AND MEDIATION.

Art. 2. In case of serious disagreement or dispute, before an appeal to arms, the Contracting Powers agree to have recourse, as far as circumstances allow, to the good offices or mediation of one or more friendly Powers.

Art. 3. Independently of this recourse, the Contracting Powers recommend that one or more Powers, strangers to the dispute, should, on their own initiative, and as far as circumstances may allow, offer their good offices or mediation to the States at variance.

Powers, strangers to the dispute, have the right to offer good offices or mediation, even during the course of hostilities.

The exercise of this right can never be regarded by one or the other of the parties in conflict as an unfriendly act.

Art. 4. The part of the mediator consists in reconciling the opposing claims and appeasing the feelings of resentment which may have arisen between the States at variance.

Art. 5. The functions of the mediator are at an end when once it is declared, either by one of the parties to the dispute, or by the mediator himself, that the means of reconciliation proposed by him are not accepted.

Art. 6. Good offices and mediation, either at the request of the parties at variance, or on the initiative of Powers strangers to the dispute, have exclusively the character of advice and never having binding force.

Art. 7. The acceptance of mediation cannot, unless there be an agreement to the contrary, have the effect of interrupting, delaying, or hindering mobilization or other measures of preparation for war.

If mediation occurs after the commencement of hostilities, it causes no interruption to the military operations in progress, unless there be an agreement to the contrary.

Art. 8. The Contracting Powers are agreed in recommending the application, when circumstances allow, of special mediation in the following form:

In case of a serious difference endangering the peace, the States at variance choose respectively a Power, to whom they intrust the mission of entering into direct communication with the Power chosen on the other side, with the object of preventing the rupture of pacific relations.

For the period of this mandate, the term of which, unless otherwise stipulated, cannot exceed thirty days, the States in conflict cease from all direct communication on the subject of the dispute, which is regarded as referred exclusively to the mediating Powers, who must use their best efforts to settle it.

In case of a definite rupture of pacific relations, these Powers are charged with the joint task of taking advantage of any opportunity to restore peace.

TITLE III.—ON INTERNATIONAL COMMISSIONS OF INQUIRY.

Art. 9. In differences of an international nature involving neither honor nor vital interests, and arising from a difference of opinion on points of fact, the Contracting Powers deem it expedient and desirable that the parties, who have not been able to come to an agreement by means of diplomacy, should as far as circumstances allow, institute an International Commission of Inquiry, to facilitate a solution of these differences by elucidating the facts by means of an impartial and conscientious investigation.

Art. 10. The International Commissions of Inquiry are constituted by special agreement between the parties in conflict.

The Convention for an inquiry defines the facts to be examined; it determines the mode and time in which the Commission is to be formed and the extent of the Commissioners' powers.

It also determines, if there is need, where the Commission is to sit; and whether it may remove to another place, the language the Com-

mission shall use and the languages the use of which shall be authorized before it, as well as the date on which each party must deposit its statement of facts, and, generally speaking, all the conditions upon which the parties have agreed.

If the parties consider it necessary to appoint Assessors, the Convention of Inquiry shall determine the mode of their selection and the extent of their powers.

Art. 11. If the Inquiry Convention has not determined where the Commission is to sit, it will sit at The Hague.

The place of meeting, once fixed, cannot be altered by the Commission except with the assent of the parties.

If the Inquiry Convention has not determined what languages are to be employed, the question shall be decided by the Commission.

Art. 12. Unless an undertaking is made to the contrary, Commissions of Inquiry will be formed in the manner determined by Articles 45 and 57 of the present Convention.

Art. 13. Should one of the Commissioners or one of the Assessors, should there be any, either die, or resign, or be unable for any reason whatever to discharge his functions, the same procedure is followed for filling the vacancy as was followed for appointing him.

Art. 14. The parties are entitled to appoint special agents to attend the Commission of Inquiry, whose duty it is to represent them and to act as intermediaries between them and the Commission.

They are further authorized to engage counsel or advocates, appointed by themselves, to state their case and uphold their interests before the Commission.

Art. 15. The International Bureau of the Permanent Court of Arbitration acts as registry for the Commissions which sit at The Hague, and it shall place its offices and staff at the disposal of the Contracting Powers for the use of the Commission of Inquiry.

Art. 16. If the Commission meets elsewhere than at The Hague, it appoints a Secretary-General, whose office serves as registry.

It is the function of the registry, under the control of the President, to make the necessary arrangements for the sittings of the Commission, the preparation of the Minutes, and, while the inquiry lasts, for the charge of the archives, which shall subsequently be transferred to the International Bureau at The Hague.

Art. 17. In order to facilitate the constitution and working of Commissions of Inquiry, the Contracting Powers recommend the following rules, which shall be applicable to the inquiry procedure in so far as the parties do not adopt other rules.

Art. 18. The Commission shall settle the details of the procedure not covered by the special Inquiry Convention or the present Convention, and shall arrange all the formalities required for dealing with the evidence.

Art. 19. On the inquiry both sides must be heard.

At the dates fixed, each party communicates to the Commission and to the other party the statements of facts, if any, and, in all cases,

the instruments, papers, and documents which it considers useful for ascertaining the truth, as well as the list of witnesses and experts whose evidence it wishes to be heard.

Art. 20. The Commission is entitled, with the assent of the Powers, to move temporarily to any place where it considers it may be useful to have recourse to this means of inquiry or to send one or more of its members. Permission must be obtained from the State on whose territory it is proposed to hold the inquiry.

Art. 21. Every investigation, and every examination of a locality, must be made in the presence of the agents and counsel of the parties or after they have been duly summoned.

Art. 22. The Commission is entitled to ask from either party for such explanations and information as it considers necessary.

Art. 23. The parties undertake to supply the Commission of Inquiry, as fully as they may think possible, with all means and facilities necessary to enable it to become completely acquainted with, and to accurately understand, the facts in question.

They undertake to make use of the means at their disposal, under their municipal law, to insure the appearance of the witnesses or experts who are in their territory and have been summoned before the Commission.

If the witnesses or experts are unable to appear before the Commission, the parties will arrange for their evidence to be taken before the qualified officials of their own country.

Art. 24. For all notices to be served by the Commission in the territory of a third Contracting Power, the Commission shall apply direct to the Government of the said Power. The same rule applies in the case of steps being taken on the spot to procure evidence.

The requests for this purpose are to be executed so far as the means at the disposal of the Power applied to under its municipal law allow. They cannot be rejected unless the Power in question considers they are calculated to impair its sovereign rights or its safety.

The Commission will equally be always entitled to act through the Power on whose territory it sits.

Art. 25. The witnesses and experts are summoned on the request of the parties or by the Commission of its own motion, and, in every case, through the Government of the State in whose territory they are.

The witnesses are heard in succession and separately, in the presence of the agents and counsel, and in the order fixed by the Commission.

Art. 26. The examination of witnesses is conducted by the President.

The members of the Commission may however put to each witness questions which they consider likely to throw light on and complete his evidence, or get information on any point concerning the witness within the limits of what is necessary in order to get at the truth.

The agents and counsel of the parties may not interrupt the witness when he is making his statements; nor put any direct question to him, but they may ask the President to put such additional questions to the witness as they think expedient.

Art. 27. The witness must give his evidence without being allowed to read any written draft. He may, however, be permitted by the President to consult notes or documents if the nature of the facts referred to necessitates their employment.

Art. 28. A Minute of the evidence of the witness is drawn up forthwith and read to the witness. The latter may make such alterations and additions as he thinks necessary, which will be recorded at the end of his statement.

When the whole of his statement has been read to the witness, he is asked to sign it.

Art. 29. The agents are authorized, in the course of or at the close of the inquiry, to present in writing to the Commission and to the other party such statements, requisitions, or summaries of the facts as they consider useful for ascertaining the truth.

Art. 30. The Commission considers its decisions in private and the proceedings are secret.

All questions are decided by a majority of the members of the Commission.

If a member declines to vote, the fact must be recorded in the Minutes.

Art. 31. The sittings of the Commission are not public, nor the Minutes and documents connected with the inquiry published except in virtue of a decision of the Commission taken with the consent of the parties.

Art. 32. After the parties have presented all the explanations and evidence, and the witnesses have all been heard, the President declares the inquiry terminated, and the Commission adjourns to deliberate and to draw up its Report.

Art. 33. The Report is signed by all the members of the Commission.

If one of the members refuses to sign, the fact is mentioned; but the validity of the Report is not affected.

Art. 34. The Report of the Commission is read at a public sitting, the agents and counsel of the parties being present or duly summoned.

A copy of the Report is given to each party.

Art. 35. The Report of the Commission is limited to a statement of facts, and has in no way the character of an Award. It leaves to the parties entire freedom as to the effect to be given to the statement.

Art. 36. Each party pays its own expenses and an equal share of the expenses incurred by the Commission.

TITLE IV.—ON INTERNATIONAL ARBITRATION.

CHAPTER I.—ON THE SYSTEM OF ARBITRATION.

Art. 37. International arbitration has for its object the settlement of disputes between States by judges of their own choice, and on the basis of respect for law.

Recourse to arbitration implies an engagement to submit in good faith to the Award.

Art. 38. In questions of a legal nature, and especially in the interpretation or application of International Conventions, arbitration is recognized by the Contracting Powers as the most effective, and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle.

Consequently, it would be desirable that, in disputes about the above-mentioned questions, the Contracting Powers should, if the case arose, have recourse to arbitration, in so far as circumstances permit.

Art. 39. The Arbitration Convention is concluded for questions already existing or for questions which may arise eventually.

It may embrace any dispute or only disputes of a certain category.

Art. 40. Independently of general or private Treaties expressly stipulating recourse to arbitration as obligatory on the Contracting Powers, the said Powers reserve to themselves the right of concluding new Agreements, general or private, with a view to extending obligatory arbitration to all cases which they may consider it possible to submit to it.

CHAPTER II.—ON THE PERMANENT COURT OF ARBITRATION.

Art. 41. With the object of facilitating an immediate recourse to arbitration for international differences, which it has not been possible to settle by diplomacy, the Contracting Powers undertake to maintain the permanent Court of Arbitration, established by the First Peace Conference accessible at all times and operating, unless otherwise stipulated by the parties, in accordance with the Rules of Procedure inserted in the present Convention.

Art. 42. The Permanent Court shall be competent for all arbitration cases, unless the parties agree to institute a special Tribunal.

Art. 43. The Permanent Court sits at The Hague. An International Bureau serves as registry for the Court.

This Bureau is the channel for communications relative to the meetings of the Court.

It has the custody of the archives and conducts all the administrative business.

The Contracting Powers undertake to communicate to the Bureau as soon as possible a certified copy of any conditions of arbitration

arrived at between them, and of any award concerning them delivered by a special Tribunal.

They undertake likewise to communicate to the Bureau the Laws, Regulations, and documents eventually showing the execution of the awards given by the Court.

Art. 44. Each Singatory Power shall select four persons at the most, of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of Arbitrators.

The persons thus selected shall be inscribed, as members of the Court, in a list which shall be notified by the Bureau to all the Contracting Powers.

Any alteration in the list of Arbitrators is brought by the Bureau to the knowledge of the Contracting Powers.

Two or more Powers may agree on the selection in common of one or more Members.

The same person can be selected by different Powers.

The Members of the Court are appointed for a term of six years. Their appointments can be renewable.

In case of the death or retirement of a member of the Court, his place shall be filled in accordance with the method of his appointment. In this case the appointment is made for a fresh period of six years.

Art. 45. When the Contracting Powers desire to have recourse to the Permanent Court for the settlement of a difference that has arisen between them, the Arbitrators called upon to form the Tribunal with jurisdiction to decide this difference, must be chosen from the general list of members of the Court.

Failing the direct agreement of the parties on the composition of the Arbitration Tribunal, the following course shall be pursued:

Each party appoints two Arbitrators, of whom one only can be its national or chosen from among the persons selected by it as members of the Permanent Court. These Arbitrators together choose an Umpire.

If the votes are equally divided, the choice of the Umpire is intrusted to a third Power, selected by the parties by common accord.

If an agreement is not arrived at on this subject, each party selects a different Power, and the choice of the Umpire is made in concert by the Powers thus selected.

If, within two months' time, these two Powers cannot come to an agreement, each of them presents two candidates taken from the list of members of the Permanent Court, exclusive of the members selected by the parties and not being nationals of either of them. Drawing lots determines which of the candidates thus presented shall be Umpire.

Art. 46. The Tribunal being thus composed, the parties notify to the Bureau their determination to have recourse to the Court the text of their "Compromis" and the names of the Arbitrators.

The Bureau communicates without delay to each Arbitrator the "Compromis," and the names of the other members of the Tribunal.

The Tribunal of Arbitration assembles on the date fixed by the parties. The Bureau makes the necessary arrangements for the meeting.

The Members of the Court, in the discharge of their duties and out of their own country, enjoy diplomatic privileges and immunities.

Art. 47. The Bureau is authorized to place its offices and staff at the disposal of the Contracting Powers for the use of any special Board of Arbitration.

The jurisdiction of the Permanent Court may, within the conditions laid down in the Regulations, be extended to disputes between non-Contracting Powers, or between Contracting Powers and non-Contracting Powers, if the Parties are agreed on recourse to this Tribunal.

Art. 48. The Contracting Powers consider it their duty, if a serious dispute threatens to break out between two or more of them, to remind these latter that the Permanent Court is open to them.

Consequently, they declare that the fact of reminding the parties at variance of the provisions of the present Convention, and the advice given to them, in the highest interests of peace, to have recourse to the Permanent Court, can only be regarded as friendly actions.

In case of dispute between two Powers, one of them can always address to the International Bureau a note containing a declaration that it would be ready to submit the dispute to arbitration.

The Bureau must at once inform the other Power of the declaration.

Art. 49. The Permanent Administrative Council, composed of the Diplomatic Representatives of the Contracting Powers accredited to The Hague and of the Netherland Minister for Foreign Affairs, who will act as President.

The Council settles its Rules of Procedure and all other necessary Regulations.

It decides all questions of administration which may arise with regard to the operations of the Court.

It has entire control over the appointment, suspension or dismissal of the officials and employés of the Bureau.

It fixes the payments and salaries, and controls the general expenditure.

At meetings duly summoned the presence of nine members is sufficient to render valid the discussions of the Council. The decisions are taken by a majority of votes.

The Council communicates to the Contracting Powers without delay the Regulations adopted by it. It furnishes them with an annual Report on the labors of the Court, the working of the administration, and the expenses. The Report likewise contains a résumé of what is important in the documents communicated to the Bureau by the Powers in virtue of Article 43, paragraphs 3 and 4.

Art. 50. The expenses of the Bureau shall be borne by the Con-

tracting Powers in the proportion fixed for the International Bureau of the Universal Postal Union.

The expenses to be charged to the adhering Powers shall be reckoned from the date on which their adhesion comes into force.

CHAPTER III.—ON ARBITRAL PROCEDURE.

Art. 51. With a view to encourage the development of arbitration, the Contracting Powers have agreed on the following Rules which shall be applicable to arbitral procedure, unless other rules have been agreed on by the parties.

Art. 52. The Powers which have recourse to arbitration sign a special Act ("Compromis"), in which the subject of the dispute is clearly defined, the time allowed for appointing Arbitrators, the form, order, and time in which the communication referred to in Article 63 must be made, and the amount of the sum which each party must deposit in advance to defray the expenses.

The "Compromis" likewise defines, if there is occasion, the manner of appointing Arbitrators, any special powers which may eventually belong to the Tribunal, where it shall meet, the language it shall use, and the languages the employment of which shall be authorized before it, and, generally speaking, all the conditions on which the parties are agreed.

Art. 53. The Permanent Court is competent to settle the "Compromis," if the parties are agreed to have recourse to it for the purpose.

It is similarly competent, even if the request is only made by one of the parties, when all attempts to reach an understanding through the diplomatic channel have failed, in the case of:

1. A dispute covered by a general Treaty of Arbitration concluded or renewed after the present Convention has come into force, and providing for a "Compromis" in all disputes and not either explicitly or implicitly excluding the settlement of the "Compromis" from the competence of the Court. Recourse cannot, however, be had to the Court if the other party declares that in its opinion the dispute does not belong to the category of disputes which can be submitted to compulsory arbitration, unless the Treaty of Arbitration confers upon the Arbitration Tribunal the power of deciding this preliminary question.

2. A dispute arising from contract debts claimed from one Power by another Power as due to its nationals, and for the settlement of which the offer of arbitration has been accepted. This arrangement is not applicable if acceptance is subject to the condition that the "Compromis" should be settled in some other way.

Art. 54. In the cases contemplated in the preceding Article, the "Compromis" shall be settled by a Commission consisting of five members selected in the manner arranged for in Article 45, paragraphs 3 to 6.

The fifth member is President of the Commission *ex officio*.

Art. 55. The duties of Arbitrator may be conferred on one Arbitrator alone or on several Arbitrators selected by the parties as they please, or chosen by them from the members of the Permanent Court of Arbitration established by the present Convention.

Failing the constitution of the Tribunal by direct agreement between the parties, the course referred to in Article 45, paragraphs 3 to 6, is followed.

Art. 56. When a Sovereign or the Chief of a State is chosen as Arbitrator, the arbitral procedure is settled by him.

Art. 57. The Umpire is President of the Tribunal *ex officio*.

When the Tribunal does not include an Umpire, it appoints its own President.

Art. 58. When the "Compromis" is settled by a Commission, as contemplated in Article 54, and in the absence of an agreement to the contrary, the Commission itself shall form the Arbitration Tribunal.

Art. 59. In case of the death, retirement, or disability from any cause of one of the Arbitrators, his place shall be filled in accordance with the method of his appointment.

Art. 60. The Tribunal sits at The Hague, unless some other place is selected by the parties.

The Tribunal can only sit in the territory of a third Power with the latter's consent.

The place of meeting once fixed cannot be altered by the Tribunal, except with the consent of the parties.

Art. 61. If the question as to what languages are to be used has not been settled by the "Compromis," it shall be decided by the Tribunal.

Art. 62. The parties are entitled to appoint special agents to attend the Tribunal, for the purpose of serving as intermediaries between themselves and the Tribunal.

They are further authorized to retain, for the defense of their rights and interests before the Tribunal, counsel or advocates appointed by them for this purpose.

The members of the Permanent Court may not act as agents, counsel, or advocates except on behalf of the Power which appointed them members of the Court.

Art. 63. As a general rule the arbitral procedure comprises two distinct phases: Pleadings and oral discussions.

The pleadings consist in the communication by the respective agents to the members of the Tribunal and the opposite party of cases, counter-cases, and, if necessary, of replies; the parties annex thereto all papers and documents called for in the case. This communication shall be made either directly or through the intermediary of the International Bureau, in the order and within the time fixed by the "Compromis."

The time fixed by the "Compromis" may be extended by mutual agreement by the parties, or by the Tribunal when the latter considers it necessary for the purpose of reaching a just decision.

Discussion consists in the oral development before the Tribunal of the arguments of the parties.

Art. 64. A certified copy of every document produced by one party must be communicated to the other party.

Art. 65. Unless special circumstances arise, the Tribunal does not meet until the pleadings are closed.

Art. 66. The discussions are under the control of the President.

They are only public if it be so decided by the Tribunal, with the assent of the parties.

They are recorded in minutes drawn up by the Secretaries appointed by the President. These minutes are signed by the President and by one of the Secretaries and alone have an authentic character.

Art. 67. After the close of the pleadings, the Tribunal has the right to refuse discussion of all new papers or documents which one party may desire to submit to it without the consent of the other party.

Art. 68. The Tribunal is free to take into consideration new papers or documents to which its attention may be drawn by the agents or counsel of the parties.

In this case, the Tribunal has the right to require the production of these Acts or documents, but is obliged to make them known to the opposite party.

Art. 69. The Tribunal can, besides, require from the agents of the parties the production of all papers, and can demand all necessary explanations. In case of refusal, the Tribunal takes note of it.

Art. 70. The agents and the counsel of the parties are authorized to present orally to the Tribunal all the arguments they may think expedient in defense of their case.

Art. 71. They are entitled to raise objections and points. The decisions of the Tribunal on those points are final, and cannot form the subject of any subsequent discussion.

Art. 72. The members of the Tribunal are entitled to put questions to the agents and counsel of the parties, and to demand explanations from them on doubtful points.

Neither the questions put nor the remarks made by members of the Tribunal during the discussions can be regarded as an expression of opinion by the Tribunal in general, or by its members in particular.

Art. 73. The Tribunal is authorized to declare its competence in interpreting the "Compromis" as well as the other acts and documents which may be invoked in the case, and in applying the principles of law.

Art. 74. The Tribunal is entitled to issue Rules of Procedure for the conduct of the case to decide the forms, order and time in which

each party must conclude its arguments, and to arrange all the formalities required for dealing with the evidence.

Art. 77. When the agents and counsel of the parties have submitted all explanations and evidence in support of their case, the President pronounces the discussion closed.

Art. 78. The deliberations of the Tribunal take place in private and the proceedings remain secret. Every decision is taken by a majority of members of the Tribunal.

Art. 79. The award, given by a majority of votes, is accompanied by a statement of reasons. It contains the names of the Arbitrators; it is signed by the President and Registrar or by the Secretary acting as Registrar.

Art. 80. The award is read out at a public meeting of the Tribunal, the agents and counsel of the parties being present, or duly summoned to attend.

Art. 81. The award, duly pronounced and notified to the agents of the parties, puts an end to the dispute definitely and without appeal.

Art. 82. Any dispute arising between the parties as to the interpretation and execution of the Award shall, in the absence of an Agreement to the contrary, be submitted to the Tribunal which pronounced it.

Art. 83. The parties can reserve in the "Compromis" the right to demand the revision of the award.

In this case, and unless there be an agreement to the contrary, the demand must be addressed to the Tribunal which pronounced the award. It can only be made on the ground of the discovery of some new fact calculated to exercise a decisive influence on the award, and which, at the time the discussion was closed, was unknown to the Tribunal and to the party demanding the revision.

Proceedings for revision can only be instituted by a decision of the Tribunal expressly recording the existence of the new fact, recognizing in it the character described in the foregoing paragraph, and declaring the demand admissible on this ground.

The "Compromis" fixes the period within which the demand for revision must be made.

Art. 84. The award is not binding except on the parties in dispute.

When there is a question of interpreting a Convention to which Powers other than those concerned in the dispute are parties, they shall inform all the Signatory Powers in good time. Each of these Powers has the right to intervene in the case. If one or more of them avail themselves of this right, the interpretation contained in the award is equally binding on them.

Art. 85. Each party pays its own expenses and an equal share of those of the Tribunal.

CHAPTER IV.—ARBITRATION BY SUMMARY PROCEDURE.

Art. 86. With a view to facilitating the working of the system of arbitration in disputes admitting of a summary procedure, the Contracting Powers adopt the following rules, which shall be observed in the absence of other arrangements and subject to the reservation that the provisions of Chapter III apply so far as may be.

Art. 87. Each of the parties in dispute appoints an Arbitrator. The two Arbitrators thus selected choose an Umpire. If they do not agree on this point, each of them proposes two candidates taken from the general list of the members of the Permanent Court exclusive of the members appointed by either of the parties and not being nationals of either of them; which of the candidates thus proposed shall be the Umpire is determined by lot.

The Umpire presides over the Tribunal, which gives its decisions by a majority of votes.

Art. 88. In the absence of any previous agreement the Tribunal, as soon as it is formed, settles the time within which the two parties must submit their respective cases to it.

Art. 89. Each party is represented before the Tribunal by an agent, who serves as intermediary between the Tribunal and the Government who appointed him.

Art. 90. The proceedings are conducted exclusively in writing. Each party, however, is entitled to ask that witnesses and experts should be called. The Tribunal has, for its part, the right to demand oral explanations from the agents of the two parties, as well as from the experts and witnesses whose appearance in Court it may consider useful.

GENERAL PROVISIONS.

Art. 91. The present Convention, duly ratified, shall replace, as between the Contracting Powers, the Convention for the Pacific Settlement of International Disputes of the 29th July, 1899.

Art. 92. The present Convention shall be ratified as speedily as possible.

The ratifications shall be deposited at The Hague.

The first deposit of ratifications shall be recorded in a procès-verbal signed by the Representatives of the Powers which take part therein and by the Netherland Minister for Foreign Affairs.

The subsequent deposits of ratifications shall be made by means of a written notification, addressed to the Netherland Government and accompanied by the instrument of ratification.

A duly certified copy of the procès-verbal relative to the first deposit of ratifications, of the notifications mentioned in the preceding paragraph, and of the instruments of ratification, shall be immediately sent by the Netherland Government, through the diplomatic

channel, to the Powers invited to the Second Peace Conference, as well as to those Powers which have adhered to the Convention. In the cases contemplated in the preceding paragraph, the said Government shall at the same time inform the Powers of the date on which it received the notification.

Art. 93. The non-Signatory Powers which have been invited to the Second Peace Conference may adhere to the present Convention.

The Power which desires to adhere notifies its intention in writing to the Netherland Government, forwarding to it the act of adhesion, which shall be deposited in the archives of the said Government.

This Government shall immediately forward to all the other Powers invited to the Second Peace Conference a duly certified copy of the notification as well as of the act of adhesion, mentioning the date on which it received the notification.

Art. 94. The conditions on which the Powers which have not been invited to the Second Peace Conference may adhere to the present Convention shall form the subject of a subsequent Agreement between the Contracting Powers.

Art. 95. The present Convention shall take effect, in the case of the Powers which were not a party to the first deposit of ratifications, sixty days after the date of the procès-verbal of this deposit, and, in the case of the Powers which ratify subsequently or which adhere, sixty days after the notification of their ratification or of their adhesion has been received by the Netherland Government.

Art. 96. In the event of one of the Contracting Parties wishing to denounce the present Convention, this denunciation would not take effect until a year after its notification made in writing to the Netherlands Government, and by it communicated at once to all the other Contracting Powers.

This denunciation shall only affect the notifying Power.

Art. 97. A register kept by the Netherland Minister for Foreign Affairs shall give the date of the deposit of ratifications effected in virtue of Article 92, paragraphs 3 and 4, as well as the date on which the notifications of adhesion (Article 93, paragraph 2) or of denunciation (Article 96, paragraph 1) have been received.

Each Contracting Power is entitled to have access to this register and to be supplied with duly certified extracts from it.

In faith whereof the Plenipotentiaries have appended their signatures to the present Convention.

Done at The Hague, the 18th October, 1907, in a single copy, which shall remain deposited in the archives of the Netherland Government, and duly certified copies of which shall be sent, through the diplomatic channel, to the Contracting Powers.

Resolution of Ratification of the Convention for the Pacific Settlement
of International Disputes, Signed at The Hague, 1907.

April 2, 1908.

Resolved (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of a convention signed by the delegates of the United States to the Second International Peace Conference, held at The Hague from June sixteenth to October eighteenth, nineteen hundred and seven, for the pacific settlement of international disputes, subject to the declaration made by the delegates of the United States before signing said convention, namely:

"Nothing contained in this convention shall be so construed as to require the United States of America to depart from its traditional policy of not intruding upon, interfering with, or entangling itself in the political questions of policy or internal administration of any foreign state; nor shall anything contained in the said convention be construed to imply a relinquishment by the United States of its traditional attitude toward purely American questions."

Resolved further, as a part of this act of ratification, That the United States approves this convention with the understanding that recourse to the permanent court for the settlement of differences can be had only by agreement thereto through general or special treaties of arbitration heretofore or hereafter concluded between the parties in dispute; and the United States now exercises the option contained in article fifty-three of said convention, to exclude the formulation of the "compromis" by the permanent court, and hereby excludes from the competence of the permanent court the power to frame the "compromis" required by general or special treaties of arbitration concluded or hereafter to be concluded by the United States, and further expressly declares that the "compromis" required by any treaty of arbitration to which the United States may be a party shall be settled only by agreement between the contracting parties, unless such treaty shall expressly provide otherwise.

CONVENTION RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND.

[Names of States.]

Considering that, while seeking means to preserve peace and prevent armed conflicts between nations, it is likewise necessary to bear in mind the case where the appeal to arms has been brought about by events which their care was unable to avert,

Animated by the desire to serve, even in this extreme case, the interests of humanity and the ever progressive needs of civilization,

Thinking it important, with this object, to revise the general laws and customs of war, either with a view to defining them more precisely, or to confining them within such limits as would mitigate their severity as far as possible.

Have deemed it necessary to complete and explain in certain particulars the work of the First Peace Conference, which, following on the Brussels Conference of 1874, and inspired by the ideas dictated by a wise and generous forethought, adopted provisions intended to define and govern the usages of war on land.

According to the views of the High Contracting Parties, these provisions, the wording of which has been inspired by the desire to diminish the evils of war as far as military necessities permit, are intended to serve as a general rule of conduct for the belligerents in their relations with each other and with the inhabitants.

It has not, however, been found possible at present to concert regulations covering all the circumstances which occur in practice.

On the other hand, it could not be intended by the High Contracting Parties that the unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military Commanders.

Until a more complete code of the laws of war has been issued the High Contracting Parties deem it expedient to declare that in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of international law, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.

They declare that it is in this sense especially that Articles 1 and 2 of the Regulations adopted must be understood.

The High Contracting Parties, desiring to conclude a fresh Convention to this effect, have appointed as their Plenipotentiaries, to wit:

[Names of Plenipotentiaries.]

Who, after having deposited their full powers, found in good and due form, have agreed upon the following:

Article 1. The Contracting Parties shall issue instructions to their armed land forces, which shall be in conformity with the Regulations Respecting the Laws and Customs of War on Land, annexed to the present Convention.

Art. 2. The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention.

Art. 3. A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

Art. 4. The present Convention duly ratified, shall as between the Contracting Powers, be substituted for the Convention of the 29th July, 1899, Respecting the Laws and Customs of War on Land.

The Convention of 1899 remains in force as between the Powers which signed it, and which do not also ratify the present Convention.

Art. 5. The present Convention shall be ratified as soon as possible. The ratifications shall be deposited at The Hague.

The first deposit of ratifications shall be recorded in a procès-verbal signed by the Representatives of the Powers which take part therein and by the Netherland Minister for Foreign Affairs.

The subsequent deposits of ratifications shall be made by means of a written notification, addressed to the Netherland Government and accompanied by the instrument of ratification.

A duly certified copy of the procès-verbal relative to the first deposit of ratifications, of the notifications mentioned in the preceding paragraph, as well as of the instruments of ratification, shall be immediately sent by the Netherland Government, through the diplomatic channel, to the Powers invited to the Second Peace Conference, as well as to the other Powers which have adhered to the Convention. In the cases contemplated in the preceding paragraph the said Government shall at the same time inform them of the date on which it received the notification.

Art. 6. Non-Signatory Powers may adhere to the present Convention.

The Power which desires to adhere notifies in writing its intention to the Netherland Government, forwarding to it the act of adhesion, which shall be deposited in the archives of the said Government.

This Government shall at once transmit to all the other Powers a duly certified copy of the notification as well as of the act of adhesion, mentioning the date on which it received the notification.

Art. 7. The present Convention shall come into force, in the case of the Powers which were a party to the first deposit of ratifications sixty days after the date of the procès-verbal of this deposit, and, in the case of the Powers which ratify subsequently or which adhere, sixty days after the notification of their ratification or of their adhesion has been received by the Netherland Government.

Art. 8. In the event of one of the Contracting Parties wishing to denounce the present Convention, the denunciation shall be notified in writing to the Netherland Government which shall at once communicate a duly certified copy of the notification to all the other Powers, informing them of the date on which it was received.

The denunciation shall only have effect in regard to the notifying Power, and one year after the notification has reached the Netherland Government.

Art. 9. A register kept by the Netherland Ministry for Foreign Affairs shall give the date of the deposit of ratifications made in virtue of Article 5, paragraphs 3 and 4, as well as the date on which the notifications of adhesion (Article 6, paragraph 2) or of denunciation (Article 8, paragraph 1) were received.

Each Contracting Power is entitled to have access to this register and to be supplied with duly certified extracts.

In faith whereof the Plenipotentiaries have appended their signatures to the present Convention.

Done at The Hague, the 18th October, 1907, in a single copy, which shall remain deposited in the archives of the Netherland Government, and duly certified copies of which shall be sent, through the diplomatic channel, to the Powers which have been invited to the Second Peace Conference.

ANNEX TO THE CONVENTION.

Regulations Respecting the Laws and Customs of War on Land.

SECTION I.—ON BELLIGERENTS.

CHAPTER I.—ON THE QUALIFICATIONS OF BELLIGERENTS.

Article 1. The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps, fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates
2. To have a fixed distinctive emblem recognizable at a distance

3. To carry arms openly; and

4. To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination "army."

Art. 2. The population of a territory which has not been occupied who, on the enemy's approach, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded a belligerent if they carry arms openly and if they respect the laws and customs of war.

Art. 3. The armed forces of the belligerent parties may consist of combatants and noncombatants. In case of capture by the enemy both have a right to be treated as prisoners of war.

CHAPTER II.—ON PRISONERS OF WAR.

Art. 4. Prisoners of war are in the power of the hostile Government, but not in that of the individuals or corps who captured them. They must be humanely treated.

All their personal belongings, except arms, horses, and military papers, remain their property.

Art. 5. Prisoners of war may be interned in a town, fortress, camp, or any other locality, and bound not to go beyond certain fixed limits; but they cannot be confined except as an indispensable measure of safety and only while the circumstances which necessitate the measure continue to exist.

Art. 6. The State may utilize the labor of prisoners of war according to their rank and aptitude, officers excepted. Their tasks shall not be excessive, and shall have nothing to do with the military operations.

Prisoners may be authorized to work for the Public Service, for private persons, or on their own account.

Work done for the State shall be paid for according to the rates in force for soldiers of the national army employed on similar tasks, or, if there are none in force, at a rate according to the work executed.

When the work is for other branches of the Public Service or for private persons, the conditions shall be settled in agreement with the military authorities.

The wages of the prisoners shall go towards improving their position, and the balance shall be paid them at the time of their release, after deducting the cost of their maintenance.

Art. 7. The Government into whose hands prisoners of war have fallen is bound to maintain them.

Failing a special agreement between the belligerents, prisoners of war shall be treated as regards food, quarters, and clothing, on the same footing as the troops of the Government which has captured them.

Art. 8. Prisoners of war shall be subject to the laws, regulations, and orders in force in the army of the State into whose hands they have fallen.

Any act of insubordination warrants the adoption, as regards them, of such measures of severity as may be necessary.

Escaped prisoners, recaptured before they have succeeded in re-joining their army or before quitting the territory occupied by the army that captured them, are liable to disciplinary punishment.

Prisoners who after succeeding in escaping are again taken prisoners, are not liable to any punishment for the previous flight.

Art. 9. Every prisoner of war, if questioned, is bound to declare his true name and rank, and if he disregards this rule, he is liable to a curtailment of the advantages accorded to the prisoners of war of his class.

Art. 10. Prisoners of war may be set at liberty on parole if the laws of their country authorize it, and, in such a case, they are bound, on their personal honor, scrupulously to fulfill, both as regards their own Government and the Government by whom they were made prisoners, the engagements they have contracted.

In such cases, their own Government shall not require of nor accept from them any service incompatible with the parole given.

Art. 11. A prisoner of war cannot be forced to accept his liberty on parole; similarly the hostile Government is not obliged to assent to the prisoner's request to be set at liberty on parole.

Art. 12. Any prisoner of war, who is liberated on parole and recaptured, bearing arms against the Government to whom he had pledged his honor, or against the allies of that Government, forfeits his right to be treated as a prisoner of war, and can be brought before the Courts.

Art. 13. Individuals who follow an army without directly belonging to it, such as newspaper correspondents and reporters, sutlers, contractors, who fall into the enemy's hands, and whom the latter think fit to detain, have a right to be treated as prisoners of war, provided they can produce a certificate from the military authorities of the army they were accompanying.

Art. 14. A Bureau for information relative to prisoners of war is instituted, on the commencement of hostilities, in each of the belligerent States, and when necessary, in the neutral countries on whose territory belligerents have been received. This Bureau is intended to answer all inquiries about prisoners of war, and is furnished by the various services concerned with all the necessary information to enable it to keep an individual return for each prisoner of war. It is kept informed of internments and changes, releases on parole, exchanges, as well as of admissions into hospitals and deaths. The office must state in this return the regimental number, name and surname, age, place of origin, rank unit, wounds, date and place of capture, internment, wounding and death, as well as any observations of a special character. The individual return shall be

sent to the Government of the other belligerent after the conclusion of peace.

It is also the duty of the Information Bureau to receive and collect all objects of personal use, valuables, letters, etc., found on the battlefields or left by prisoners who have been released on parole, or exchanged; or who have escaped or died in hospital or ambulance, and to transmit them to those interested.

Art. 15. Relief Societies for prisoners of war, which are properly constituted in accordance with the law of the country with the object of serving as the intermediary for charity, shall receive from the belligerents for themselves and their duly accredited agents every facility, within the bounds of military requirements and Administrative Regulations for the effective accomplishment of their humane task. Delegates of these Societies may be admitted to the places of internment for the distribution of relief, as also to the halting places of repatriated prisoners, if furnished with a personal permit by the military authorities, and on giving an engagement in writing to comply with all their Regulations for order and police.

Art. 16. The Information Bureau shall have the privilege of free postage. Letters, money orders, and valuables, as well as postal parcels destined for the prisoners of war or dispatched by them, shall be free of all postal duties both in the countries of origin and destination, as well as in those they pass through.

Gifts and relief in kind for prisoners of war shall be admitted free of all duties of entry and others, as well as of payments for carriage by the State railways.

Art. 17. Officers taken prisoners shall receive the same rate of pay as officers of corresponding rank in the country where they are detained, the amount to be ultimately refunded by their own Government.

Art. 18. Prisoners of war shall enjoy complete liberty in the exercise of their religion, including attendance at their own church services, provided only they comply with the regulations for order and police issued by the military authorities.

Art. 19. The wills of prisoners of war are received or drawn up on the same conditions as for soldiers of the National Army.

The same rules shall be observed regarding death certificates, as well as for the burial of prisoners of war, due regard being paid to their grade and rank.

Art. 20. After the conclusion of peace, the repatriation of prisoners of war shall take place as speedily as possible.

CHAPTER III.—ON THE SICK AND WOUNDED.

Art. 21. The obligations of belligerents with regard to the sick and wounded are governed by the Geneva Convention of the 22d August, 1864, subject to any modifications which may be introduced into it.

SECTION II.—ON HOSTILITIES.

CHAPTER I.—ON MEANS OF INJURING THE ENEMY, SIEGES, AND BOMBARDMENTS.

Art. 22. The right of belligerents to adopt means of injuring the enemy is not unlimited.

Art. 23. Besides the prohibitions provided by special Conventions, it is especially prohibited:

- (a) To employ poison or poisoned arms;
- (b) To kill or wound treacherously individuals belonging to the hostile nation or army;
- (c) To kill or wound an enemy who, having laid down arms, or having no longer means of defense, has surrendered at discretion;
- (d) To declare that no quarter will be given;
- (e) To employ arms, projectiles, or material of a nature to cause superfluous injury;
- (f) To make improper use of a flag of truce, the national flag, or military ensigns and the enemy's uniform, as well as the distinctive badges of the Geneva Convention;
- (g) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war.
- (h) To declare abolished, suspended, or inadmissible in a Court of law the rights and action of the nationals of the hostile party.

A belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of war.

Art. 24. Ruses of war and the employment of methods necessary to obtain information about the enemy and the country, are considered allowable.

Art. 25. The attack or bombardment by whatever means, of towns, villages, habitations or buildings which are not defended, is prohibited.

Art. 26. The Commander of an attacking force, before commencing a bombardment, except in the case of an assault, should do all he can to warn the authorities.

Art. 27. In sieges and bombardments all necessary steps should be taken to spare as far as possible edifices devoted to religion, art, science, and charity, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not used at the same time for military purposes.

The besieged should indicate these buildings or places by some particular and visible signs, which should previously be notified to the assailants.

Art. 28. The pillage of a town or place, even when taken by assault, is prohibited.

CHAPTER II.—ON SPIES.

Art. 29. An individual can only be considered a spy if, acting clandestinely, or on false pretenses, he obtains, or seeks to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.

Thus, soldiers not in disguise who have penetrated into the zone of operations of a hostile army to obtain information are not considered spies. Similarly, the following are not considered spies: soldiers or civilians, carrying out their mission openly, charged with the delivery of dispatches destined either for their own army or for that of the enemy. To this class belong likewise individuals sent in balloons to deliver dispatches, and generally to maintain communication between the various parts of an army or a territory.

Art. 30. A spy taken in the act cannot be punished without previous trial.

Art. 31. A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war and incurs no responsibility for his previous acts of espionage.

CHAPTER III.—ON FLAGS OF TRUCE.

Art. 32. An individual is considered as bearing a flag of truce who is authorized by one of the belligerents to enter into communication with the other, and who carries a white flag. He has a right to inviolability, as well as the trumpeter, bugler, or drummer, the flagbearer and the interpreter who may accompany him.

Art. 33. The Chief to whom a flag of truce is sent is not obliged to receive it in all circumstances.

He can take all steps necessary to prevent the envoy taking advantage of his mission to obtain information.

In case of abuse, he has the right to detain the envoy temporarily.

Art. 34. The envoy loses his rights of inviolability if it is proved beyond doubt that he has taken advantage of his privileged position to provoke or commit an act of treachery.

CHAPTER IV.—ON CAPITULATIONS.

Art. 35. Capitulations agreed on between the Contracting Parties must be in accordance with the rules of military honor.

When once settled, they must be scrupulously observed by both the parties.

CHAPTER V.—ON ARMISTICES.

Art. 36. An armistice suspends military operations by mutual agreement between the belligerent parties. If its duration is not fixed, the belligerent parties can resume operations at any time, pro-

vided always the enemy is warned within the time agreed upon, in accordance with the terms of the armistice.

Art. 37. An armistice may be general or local. The first suspends all military operations of the belligerent States; the second, only those between certain fractions of the belligerent armies and in a fixed radius.

Art. 38. An armistice must be notified officially, and in good time, to the competent authorities and the troops. Hostilities are suspended immediately after the notification, or at a fixed date.

Art. 39. It is for the Contracting Parties to settle, in the terms of the armistice, what communications may be held, on the theater of war, with the population and between the inhabitants of one belligerent state and those of the other.

Art. 40. Any serious violation of the armistice by one of the parties gives the other party the right to denounce it, and even, in case of urgency, to recommence hostilities at once.

Art. 41. A violation of the terms of the armistice by private individuals acting on their own initiative, only confers the right of demanding the punishment of the offenders, and, if necessary, indemnity for the losses sustained.

SECTION III.—ON MILITARY AUTHORITY OVER HOSTILE TERRITORY.

Art. 42. Territory is considered occupied when it is actually placed under the authority of the hostile army.

The occupation applies only to the territory where such authority is established, and in a position to assert itself.

Art. 43. The authority of the legitimate power having actually passed into the hands of the occupant, the latter shall take all steps in his power to reestablish and insure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

Art. 44. Any compulsion of the population of occupied territory to furnish information about its own army or about its means of defence is prohibited.

Art. 45. Any pressure on the population of occupied territory to take the oath to the hostile Power is prohibited.

Art. 46. Family honor and rights, individual lives and private property, as well as religious convictions and practice, must be respected.

Private property cannot be confiscated.

Art. 47. Pillage is formally prohibited.

Art. 48. If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the State, he shall do it, as far as possible, in accordance with the rules in existence and the assessment in force, and will in consequence be bound to

defray the expenses of the administration of the occupied territory on the same scale as that by which the legitimate Government was bound.

Art. 49. If, besides the taxes mentioned in the preceding Article; the occupant levies other money taxes in the occupied territory, this can only be for military necessities or the administration of such territory.

Art. 50. No general penalty, pecuniary or otherwise, can be inflicted on the population on account of the acts of individuals for which it cannot be regarded as jointly and severally responsible.

Art. 51. No contribution shall be collected except under a written order and on the responsibility of a Commander-in-Chief.

This collection shall only take place, as far as possible, in accordance with the rules in existence and the assessment of taxes in force.

For every contribution a receipt shall be given to the contributors.

Art. 52. Neither requisition in kind nor services can be demanded from communes or inhabitants except for the necessities of the army of occupation. They must be in proportion to the resources of the country, and of such a nature as not to involve the population in the obligation of taking part in military operations against their own country.

These requisitions and services shall only be demanded on the authority of the Commander in the locality occupied.

The requisitions in kind shall, as far as possible, be paid for in ready money; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible.

Art. 53. An army of occupation can only take possession of the cash, funds, and property liable to requisition belonging strictly to the State, depôts of arms, means of transport, stores and supplies, and, generally, all movable property of the State which may be used for military operations.

All appliances, whether on land, at sea, or in the air adapted for the transmission of news, or for the transport of persons or things, apart from cases governed by maritime law, as well as depôts of arms and, generally, all kinds of war material, even though belonging to Companies or to private persons, are likewise material which may serve for military individuals, but they must be restored at the conclusion of peace, and indemnities paid for them.

Art. 54. Submarine cables connecting an occupied territory with a neutral territory shall not be seized or destroyed except in the case of absolute necessity. They must likewise be restored and compensation fixed when peace is made.

Art. 55. The occupying State shall be regarded only as administrator and usufructuary of the public buildings, real estate, forests, and agricultural works belonging to the hostile State, and situated in the occupied country. It must protect the capital of these properties, and administer it according to the rules of usufruct.

Art. 56. The property of the communes, that of religious, char-

itable, and educational institutions, and those of arts and science, even when State property, shall be treated as private property.

All seizure of, and destruction, or intentional damage done to such institutions, to historical monuments, works of art or science, is prohibited, and should be made the subject of proceedings.

SECTION IV.—ON THE INTERNMENT OF BELLIGERENTS AND THE CARE OF THE WOUNDED IN NEUTRAL COUNTRIES.

Art. 57. A neutral State which receives in its territory troops belonging to the belligerent armies shall intern them, as far as possible, at a distance from the theater of war.

It can keep them in camps, and even confine them in fortresses or locations assigned for this purpose.

It shall decide whether officers may be left at liberty on giving their parole that they will not leave the neutral territory without authorization.

Art. 58. Failing a special Convention to the contrary the neutral State shall supply the interned with the food, clothing, and relief required by humanity.

At the conclusion of peace, the expenses caused by the internment shall be made good.

Art. 59. A neutral State may authorize the passage through its territory of wounded or sick belonging to the belligerent armies, on condition that the trains bringing them shall carry neither combatants nor war material. In such a case, the neutral State is bound to adopt such measures of safety and control as may be necessary for the purpose.

Wounded and sick brought under these conditions into neutral territory by one of the belligerents, and belonging to the hostile party, must be guarded by the neutral State, so as to insure their not taking part again in the military operations. The same duty shall devolve on the neutral State with regard to wounded or sick of the other army who may be committed to its care.

Art. 60. The Geneva Convention applies to sick and wounded interned in neutral territory.

CONVENTION RESPECTING THE RIGHTS AND DUTIES OF NEUTRAL POWERS AND PERSONS IN CASE OF WAR ON LAND.

[Names of States.]

With a view to laying down more clearly the rights and duties of neutral Powers in case of war on land and regulating the position of the belligerents who have taken refuge in neutral territory,

Being likewise desirous of defining the meaning of the term "neutral," pending the possibility of settling, in its entirety, the position of neutral individuals in their relations with the belligerents,

Have resolved to conclude a Convention to this effect, and have, in consequence, appointed the following as their Plenipotentiaries:

[Names of Plenipotentiaries.]

Who, after having deposited their full powers, found in good and due form, have agreed upon the following provisions:

CHAPTER I.—THE RIGHTS AND DUTIES OF NEUTRAL POWERS.

Article 1. The territory of neutral Powers is inviolable.

Art. 2. Belligerents are forbidden to move troops or convoys of either munitions of war or supplies across the territory of a neutral Power.

Art. 3. Belligerents are likewise forbidden to:

(a) Erect on the territory of a neutral Power a wireless telegraphy station or other apparatus for the purpose of communicating with belligerent forces on land or sea.

(b) Use any installation of this kind established by them before the war on the territory of a neutral Power for purely military purposes, and which has not been opened for the service of public messages.

Art. 4. Corps of combatants cannot be formed nor recruiting agencies opened on the territory of a neutral Power to assist the belligerents.

Art. 5. A neutral Power must not allow any of the acts referred to in Articles 2 to 4 to occur on its territory.

It is not called upon to punish acts in violation of its neutrality unless the said acts have been committed on its own territory.

Art. 6. The responsibility of a neutral Power is not engaged by the fact of persons crossing the frontier separately to offer their services to one of the belligerents.

Art. 7. A neutral Power is not called upon to prevent the export or transport, on behalf of one or other of the belligerents, of arms, munitions of war, or, in general, of anything which can be of use to an army or a fleet.

Art. 8. A neutral Power is not called upon to forbid or restrict the use on behalf of the belligerents of telegraph or telephone cables or of wireless telegraphy apparatus belonging to it or to Companies or private individuals.

Art. 9. Every measure of restriction or prohibition taken by a neutral Power in regard to the matters referred to in Articles 7 and 8 must be impartially applied by it to both belligerents.

A neutral Power must see to the same obligation being observed by Companies or private individuals owning telegraph or telephone cables or wireless telegraphy apparatus.

Art. 10. The fact of a neutral Power resisting, even by force, attempts to violate its neutrality cannot be regarded as a hostile act.

CHAPTER II.—BELLIGERENTS INTERNED AND WOUNDED TENDED IN NEUTRAL TERRITORY.

Art. 11. A neutral Power which receives on its territory troops belonging to the belligerent armies shall intern them, as far as possible, at a distance from the theatre of war.

It may keep them in camps and even confine them in fortresses or in places set apart for this purpose.

It shall decide whether officers can be left at liberty on giving their parole not to leave the neutral territory without permission.

Art. 12. In the absence of a special Convention to the contrary, the neutral Power shall supply the interned with the food, clothing and relief required by humanity.

At the conclusion of peace the expenses caused by the internment shall be made good.

Art. 13. A neutral Power which receives escaped prisoners of war shall leave them at liberty. If it allows them to remain in its territory it may assign them a place of residence.

The same rule applies to prisoners of war brought by troops taking refuge in the territory of a neutral Power.

Art. 14. A neutral Power may authorize the passage into its territory of the sick and wounded belonging to the belligerent armies, on condition that the trains bringing them shall carry neither personnel nor war material. In such a case, the neutral Power is bound to take whatever measures of safety and control are necessary for the purpose.

The sick or wounded brought under these conditions into neutral territory by one of the belligerents, and belonging to the hostile party, must be guarded by the neutral Power so as to insure their not taking part again in the military operations. The same duty shall devolve

on the neutral State with regard to wounded or sick of the other army who may be committed to its care.

Art. 15. The Geneva Convention applies to sick and wounded interned in neutral territory.

CHAPTER III.—NEUTRAL PERSONS.

Art. 16. The nationals of a State which is not taking part in the war are considered as neutrals.

Art. 17. A neutral cannot avail himself of his neutrality:

(a) If he commits hostile acts against a belligerent.

(b) If he commits acts in favor of a belligerent, particularly if he voluntarily enlists in the ranks of the armed force of one of the parties.

In such a case, the neutral shall not be more severely treated by the belligerent as against whom he has abandoned his neutrality than a national of the other belligerent State could be for the same act.

Art. 18. The following acts shall not be considered as committed in favor of one belligerent in the sense of Article 17, letter (b):

(a) Supplies furnished or loans made to one of the belligerents, provided that the person who furnishes the supplies or who makes the loans lives neither in the territory of the other party nor in the territory occupied by him, and that the supplies do not come from these territories.

(b) Services rendered in matters of police or civil administration.

CHAPTER IV.—RAILWAY MATERIAL.

Art. 19. Railway material coming from the territory of neutral Powers, whether it be the property of the said Powers or of Companies or private persons, and recognizable as such, shall not be requisitioned or utilized by a belligerent except where and to the extent that it is absolutely necessary. It shall be sent back as soon as possible to the country of origin.

A neutral Power may likewise, in case of necessity, retain and utilize to an equal extent material coming from the territory of the belligerent Power.

Compensation shall be paid by one party or the other in proportion to the material used, and to the period of usage.

CHAPTER V.—FINAL PROVISIONS.

Art. 20. The provisions of the present Convention do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention.

[Articles providing for ratification follow.]

CONVENTION FOR THE ADAPTATION TO NAVAL WAR OF THE PRINCIPLES OF THE GENEVA CONVENTION.

[Names of States.]

Animated alike by the desire to diminish, as far as depends on them, the inevitable evils of war,

And wishing with this object to adapt to maritime warfare the principles of the Geneva Convention of the 6th July, 1906,

Have resolved to conclude a Convention for the purpose of revising the Convention of the 29th July, 1899, relative to this question, and have appointed the following as their Plenipotentiaries:

[Names of Plenipotentiaries.]

Who, after having deposited their full powers, found in good and due form, have agreed upon the following provisions:

Article 1. Military hospital-ships, that is to say, ships constructed or assigned by States specially and solely with a view to assisting the wounded, sick, and shipwrecked, the names of which have been communicated to the belligerent Powers at the commencement or during the course of hostilities, and in any case before they are employed, shall be respected, and cannot be captured while hostilities last.

These ships, moreover, are not on the same footing as war-ships as regards their stay in a neutral port.

Art. 2. Hospital-ships, equipped wholly or in part at the expense of private individuals or officially recognized relief societies, shall be likewise respected and exempt from capture, if the belligerent Power to whom they belong has given them an official commission and has notified their names to the hostile Power at the commencement of or during hostilities, and in any case before they are employed.

These ships must be provided with a certificate from the competent authorities declaring that the vessels have been under their control while fitting out and on final departure.

Art. 3. Hospital-ships, equipped wholly or in part at the expense of private individuals or officially recognized societies of neutral countries, shall be respected and exempt from capture, on condition that they are placed under the control of one of the belligerents, with the previous consent of their own Government and with the authorization of the belligerent himself, and that the latter has notified their name to his adversary at the commencement of or during hostilities, and in any case, before they are employed.

Art. 4. The ships mentioned in Articles 1, 2, and 3 shall afford relief and assistance to the wounded, sick, and shipwrecked of the belligerents without distinction of nationality.

The Governments undertake not to use these ships for any military purpose.

These vessels must in no wise hamper the movements of the combatants.

During and after an engagement they will act at their own risk and peril.

The belligerents shall have the right to control and visit them; they can refuse their help, order them off, make them take a certain course, and put a Commissioner on board; they can even detain them, if important circumstances require it.

As far as possible, the belligerents shall enter in the log of the hospital-ships the orders which they give them.

Art. 5. Military hospital-ships shall be distinguished by being painted white outside with a horizontal band of green about a metre and a half in breadth.

The ships mentioned in Articles 2 and 3 shall be distinguished by being painted white outside with a horizontal band of red about a metre and a half in breadth.

The boats of the ships above mentioned, as also small craft which may be used for hospital work, shall be distinguished by similar painting.

All hospital-ships shall make themselves known by hoisting, with their national flag, the white flag with a red cross provided by the Geneva Convention, and further, if they belong to a neutral State, by flying at the mainmast the national flag of the belligerent under whose control they are placed.

Hospital-ships which, in the terms of Article 4, are detained by the enemy, must haul down the national flag of the belligerent to whom they belong.

The ships and boats above mentioned which wish to insure by night the freedom from interference to which they are entitled, must, subject to the assent of the belligerent they are accompanying, take the necessary measures to render their special painting sufficiently plain.

Art. 6. The distinguishing signs referred to in Article 5 can only be used, whether in time of peace or war, for protecting or indicating the ships therein mentioned.

Art. 7. In the case of a fight on board a war-ship, the sick-wards shall be respected and spared as far as possible.

The said sick-wards and the matériel belonging to them remain subject to the laws of war; they cannot, however, be used for any purpose other than that for which they were originally intended, so long as they are required for the sick and wounded.

The commander, however, into whose power they have fallen may apply them to other purposes, if the military situation requires it,

after seeing that the sick and wounded on board are properly provided for.

Art. 8. Hospital-ships and sick-wards of vessels are no longer entitled to protection if they are employed for the purpose of injuring the enemy.

The fact of the staff of the said ships and sick-wards being armed for maintaining order and for defending the sick and wounded, and the presence of wireless telegraphy apparatus on board, is not a sufficient reason for withdrawing protection.

Art. 9. Belligerents may appeal to the charity of the commanders of neutral merchant-ships, yachts, or boats to take on board and tend the sick and wounded.

Vessels responding to this appeal, and also vessels which have of their own accord rescued sick, wounded, or shipwrecked men, shall enjoy special protection and certain immunities. In no case can they be captured for having such persons on board, but, apart from special undertakings that have been made to them, they remain liable to capture for any violations of neutrality they may have committed.

Art. 10. The religious, medical, and hospital staff of any captured ship is inviolable, and its members cannot be made prisoners of war. On leaving the ship they take away with them the objects and surgical instruments which are their own private property.

This staff shall continue to discharge its duties while necessary, and can afterwards leave, when the Commander-in-chief considers it possible.

The belligerents must guarantee to the said staff, when it has fallen into their hands, the same allowances and pay which are given to the staff of corresponding rank in their own navy.

Art. 11. Sailors and soldiers on board, when sick or wounded, as well as other persons officially attached to fleets or armies, whatever their nationality, shall be respected and tended by the captors.

Art. 12. Any war-ship belonging to a belligerent may demand that sick, wounded, or shipwrecked men on board military hospital-ships, hospital-ships belonging to relief societies or to private individuals, merchant-ships, yachts, or boats, whatever the nationality of these vessels, should be handed over.

Art. 13. If sick, wounded, or shipwrecked persons are taken on board a neutral war-ship, every possible precaution must be taken that they do not again take part in the operations of the war.

Art. 14. The shipwrecked, wounded, or sick of one of the belligerents who fall into the power of the other belligerent are prisoners of war. The captor must decide, according to circumstances, whether to keep them, send them to a port of his own country, to a neutral port, or even to an enemy port. In this last case, prisoners thus repatriated cannot serve again while the war lasts.

Art. 15. The shipwrecked, sick, or wounded, who are landed at a neutral port with the consent of the local authorities, must, unless an arrangement is made to the contrary between the neutral State and

the belligerent States, be guarded by the neutral State so as to prevent them again taking part in the operations of the war.

The expenses of tending them in hospital and internment shall be borne by the State to which the shipwrecked, sick, or wounded persons belong.

Art. 16. After every engagement, the two belligerents, so far as military interests permit, shall take steps to look for the shipwrecked, sick, and wounded, and to protect them, as well as the dead, against pillage and ill-treatment.

They shall see that the burial, whether by land or sea, or cremation of the dead shall be preceded by a careful examination of the corpse.

Art. 17. Each belligerent shall send, as early as possible, to the authorities of their country, navy, or army, the military marks or documents of identity found on the dead and the description of the sick and wounded picked up by him.

The belligerents shall keep each other reciprocally informed as to internments and transfers as well as to the admissions into hospital and deaths which have occurred among the sick and wounded in their hands. They shall collect all the objects of personal use, valuables, letters, etc., which are found in the captured ships, or which have been left by the sick or wounded who died in hospital, in order to have them forwarded to the persons concerned by the authorities of their own country.

Art. 18. The provisions of the present Convention do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention.

Art. 19. The Commanders-in-chief of the belligerent fleets must see that the above Articles are properly carried out; they will have also to see to cases not covered thereby, in accordance with the instructions of their respective Governments and in conformity with the general principles of the present Convention.

Art. 20. The Signatory Powers shall take the necessary measures for bringing the provisions of the present Convention to the knowledge of their naval forces, and especially of the members entitled thereunder to immunity, and for making them known to the public.

Art. 21. The Signatory Powers likewise undertake to enact or to propose to their Legislatures, if their criminal laws are inadequate, the measures necessary for checking in time of war individual acts of pillage and ill-treatment in respect to the sick and wounded in the fleet, as well as for punishing, as an unjustifiable adoption of naval or military marks, the unauthorized use of the distinctive marks mentioned in Article 5 by vessels not protected by the present Convention.

They will communicate to each other, through the Netherland Government, the enactments for preventing such acts at the latest within five years of the ratification of the present Convention.

Art. 22. In the case of operations of war between the land and sea forces of belligerents, the provisions of the present Convention do not apply except between the forces actually on board ship.

Art. 23. [As to ratification.]

Art. 24. Non-Signatory Powers which have accepted the Geneva Convention of the 6th July, 1906, may adhere to the present Convention.

The Power which desires to adhere notifies its intention to the Netherland Government in writing, forwarding to it the act of adhesion, which shall be deposited in the archives of the said Government.

The said Government shall at once transmit to all the other Powers a duly certified copy of the notification as well as of the act of adhesion, mentioning the date on which it received the notification.

Art. 25. The present Convention, duly ratified, shall replace as between Contracting Powers, the Convention of the 29th July, 1899, for the adaptation to maritime warfare of the principles of the Geneva Convention.

The Convention of 1899 remains in force as between the Powers which signed it but which do not also ratify the present Convention.

Arts. 26-28. [As to ratification.]

CONVENTION RELATIVE TO THE CREATION OF AN INTERNATIONAL PRIZE COURT.

[Names of States.]

Animated by the desire to settle in an equitable manner the differences which sometimes arise in the course of a naval war in connection with the decisions of National Prize Courts;

Considering that, if these Courts are to continue to exercise their functions in the manner determined by national legislation it is desirable that in certain cases an appeal should be provided, under conditions conciliating, as far as possible, the public and private interests involved in matters of prize;

Whereas, moreover, the institution of an International Court, whose jurisdiction and procedure would be carefully defined, has seemed to be the best method of attaining this object;

Convinced, finally, that in this manner the hardships consequent on naval war would be mitigated; that, in particular, good relations will be more easily maintained between belligerents and neutrals and peace better assured;

Desirous of concluding a Convention to this effect, have appointed the following as their Plenipotentiaries:

[Names of Plenipotentiaries.]

Who, after depositing their full powers, found in good and due form, have agreed upon the following provisions:

PART I.—GENERAL PROVISIONS.

Article 1. The validity of the capture of a merchant-ship or its cargo is decided before a Prize Court in accordance with the present Convention when neutral or enemy property is involved.

Art. 2. Jurisdiction in matters of prize is exercised in the first instance by the Prize Courts of the belligerent captor.

The judgments of these Courts are pronounced in public or are officially notified to parties concerned who are neutrals or enemies.

Art. 3. The judgments of National Prize Courts may be brought before the International Prize Court—

1. When the judgment of the National Prize Courts affects the property of a neutral Power or individual.

2. When the judgment affects enemy property and relates to—

(a) Cargo on board a neutral ship;

(b) An enemy ship captured in the territorial waters of a neutral Power, when that Power has not made the capture the subject of a diplomatic claim;

(c) A claim based upon the allegation that the seizure has been effected in violation, either of the provisions of a Convention in force between the belligerent Powers, or of an enactment issued by the belligerent captor.

The appeal against the judgment of the National Court can be based on the ground that the judgment was wrong either in fact or in law.

Art. 4. An appeal may be brought—

1. By a neutral Power, if the judgment of the National Tribunals injuriously affects its property or the property of its nationals (Article 3 (1)), or if the capture of an enemy vessel is alleged to have taken place in the territorial waters of that Power (Article 3 (2) (b)).

2. By a neutral individual, if the judgment of the National Court injuriously affects his property (Article 3 (1)), subject, however, to the reservation that the Power to which he belongs may forbid him to bring the case before the Court, or may itself undertake the proceedings in his place.

3. By an individual subject or citizen of an enemy Power, if the judgment of the National Court injuriously affects his property in the cases referred to in Article 3 (2), except that mentioned in paragraph (b).

Art. 5. An appeal may also be brought on the same conditions as in the preceding Article, by persons belonging either to neutral States or to the enemy, deriving their rights from and entitled to represent an individual qualified to appeal, and who have taken part in the proceedings before the National Court. Persons so entitled may appeal separately to the extent of their interest.

The same rule applies in the case of persons belonging either to neutral States or to the enemy who derive their rights from and are entitled to represent a neutral Power whose property was the subject of the decision.

Art. 6. When, in accordance with the above Article 3, the International Court has jurisdiction, the National Courts cannot deal with a case in more than two instances. The municipal law of the belligerent captor shall decide whether the case may be brought before the International Court after judgment has been given in first instance or only after an appeal.

If the National Courts fail to give final judgment within two years from the date of capture, the case may be carried direct to the International Court.

Art. 7. If a question of law to be decided is covered by a Treaty in force between the belligerent captor and a Power which is itself or whose subject or citizen is a party to the proceedings, the Court is governed by the provisions of the said Treaty.

In the absence of such provisions, the Court shall apply the rules of international law. If no generally recognized rule exists, the Court shall give judgment in accordance with the general principles of justice and equity.

The above provisions apply equally to questions relating to the order and mode of proof.

If, in accordance with Article 3 (2) (c), the ground of appeal is the violation of an enactment issued by the belligerent captor, the Court will enforce the enactment.

The Court may disregard failure to comply with the procedure laid down in the enactments of the belligerent captor, when it is of opinion that the consequences of complying therewith are unjust and inequitable.

Art. 8. If the Court pronounces the capture of the vessel or cargo to be valid, they shall be disposed of in accordance with the laws of the belligerent captor.

If it pronounces the capture to be null, the Court shall order restitution of the vessel or cargo, and shall fix, if there is occasion, the amount of the damages. If the vessel or cargo have been sold or destroyed, the Court shall determine the compensation to be given to the owner on this account.

If the national Court pronounced the capture to be null, the Court can only be asked to decide as to the damages.

Art. 9. The Contracting Powers undertake to submit in good faith to the decisions of the International Prize Court and to carry them out with the least possible delay.

PART II.—CONSTITUTION OF THE INTERNATIONAL PRIZE COURT.

Art. 10. The International Prize Court is composed of Judges and Deputy Judges, who will be appointed by the Contracting Powers, and must all be jurists of known proficiency in questions of international maritime law, and of the highest moral reputation.

The appointment of these Judges and Deputy Judges shall be made within six months after the ratification of the present Convention.

Art. 11. The Judges and Deputy Judges are appointed for a period of six years, reckoned from the date on which the notification of their appointment is received by the Administrative Council established by the Convention for the Pacific Settlement of International Disputes of the 29th July, 1899. Their appointments can be renewed.

Should one of the Judges or Deputy Judges die or resign, the same procedure is followed for filling the vacancy as was followed for appointing him. In this case, the appointment is made for a fresh period of six years.

Art. 12. The Judges of the International Prize Court are all equal in rank and have precedence according to the date on which the notification of their appointment was received (Article 11, paragraph 1), and if they sit by rota (Article 15, paragraph 2), according to the date on which they entered upon their duties. When the date is the same the senior in age takes precedence.

The Deputy Judges when acting are assimilated to the Judges. They rank, however, after them.

Art. 13. The Judges enjoy diplomatic privileges and immunities in the performance of their duties and when outside their own country.

Before taking their seat, the Judges must swear, or make a solemn promise before the Administrative Council, to discharge their duties impartially and conscientiously.

Art. 14. The Court is composed of fifteen Judges; nine Judges constitute a quorum.

A Judge who is absent or prevented from sitting is replaced by the Deputy Judge.

Art. 15. The Judges appointed by the following Contracting Powers: Germany, the United States of America, Austria-Hungary, France, Great Britain, Italy, Japan, and Russia, are always summoned to sit.

The Judges and Deputy Judges appointed by the other Contracting Powers sit by rota as shown in the Table annexed to the present Convention; their duties may be performed successively by the same person. The same Judge may be appointed by several of the said Powers.

Art. 16. If a belligerent Power has, according to the rota, no Judge sitting in the Court, it may ask that the Judge appointed by it should take part in the settlement of all cases arising from the war. Lots shall then be drawn as to which of the Judges entitled to sit according to the rota shall withdraw. This arrangement does not affect the Judge appointed by the other belligerent.

Art. 17. No Judge can sit who has been a party, in any way whatever, to the sentence pronounced by the National Courts, or has taken part in the case as counsel or advocate for one of the parties.

No Judge or Deputy Judge can, during his tenure of office, appear as agent or advocate before the International Prize Court, nor act for one of the parties in any capacity whatever.

Art. 18. The belligerent captor is entitled to appoint a naval officer of high rank to sit as Assessor, but with no voice in the decision. A neutral Power, which is a party to the proceedings or whose subject or citizen is a party, has the same right of appointment; if as the result of this last provision more than one Power is concerned, they must agree among themselves, if necessary by lot, on the officer to be appointed.

Art. 19. The Court elects its President and Vice-President by an absolute majority of the votes cast. After two ballots, the election is made by a bare majority, and, in case the votes are equal, by lot.

Art. 20. The Judges on the International Prize Court are entitled to travelling allowances in accordance with the regulations in force in their own country, and in addition receive, while the Court is sitting or while they are carrying out duties conferred upon them by the Court, a sum of 100 Netherland florins per diem.

These payments are included in the general expenses of the Court dealt with in Article 47, and are paid through the International Bureau established by the Convention of the 29th July, 1899.

The Judges may not receive from their own Government or from that of any other Power any remuneration in their capacity of members of the Court.

Art. 21. The seat of the International Prize Court is at The Hague and it cannot, except in the case of force majeure, be transferred elsewhere without the consent of the belligerents.

Art. 22. The Administrative Council fulfils, with regard to the International Prize Court, the same functions as to the Permanent Court of Arbitration, but only Representatives of Contracting Powers will be members of it.

Art. 23. The International Bureau acts as registry to the International Prize Court and must place its offices and staff at the disposal of the Court. It has charge of the archives and carries out the administrative work.

The Secretary-General of the International Bureau acts as Registrar.

The necessary secretaries to assist the Registrar, translators and shorthand writers are appointed and sworn in by the Court.

Art. 24. The Court determines which language it will itself use and what languages may be used before it.

In every case the official language of the National Courts which have had cognizance of the case may always be used before the Court.

Art. 25. Powers which are concerned in a case may appoint special agents to act as intermediaries between themselves and the Court. They may also engage counsel or advocates to defend their rights and interests.

Art. 26. A private person concerned in a case will be represented before the Court by an attorney, who must be either an advocate qualified to plead before a Court of Appeal or a High Court of one of the Contracting States, or a lawyer practising before a similar Court, or lastly, a professor of law at one of the higher teaching centres of those countries.

Art. 27. For all notices to be served, in particular on the parties, witnesses, or experts, the Court may apply direct to the Government of the State on whose territory the service is to be carried out. The same rule applies in the case of steps being taken to procure evidence.

The requests for this purpose are to be executed so far as the means at the disposal of the Power applied to under its municipal law allow. They cannot be rejected unless the Power in question considers them calculated to impair its sovereign rights or its safety. If the request is complied with, the fees charged must only comprise the expenses actually incurred.

The Court is equally entitled to act through the Power on whose territory it sits.

Notices to be given to parties in the place where the Court sits may be served through the International Bureau.

PART III.—PROCEDURE IN THE INTERNATIONAL PRIZE COURT.

Art. 28. An appeal to the International Prize Court is entered by means of a written declaration made in the National Court which has already dealt with the case or addressed to the International Bureau; in the latter case the appeal can be entered by telegram.

The period within which the appeal must be entered is fixed at 120 days, counting from the day the decision is delivered or notified (Article 2, paragraph 2).

Art. 29. If the notice, of appeal is entered in the National Court, this Court, without considering the question whether the appeal was entered in due time, will transmit within seven days the record of the case to the International Bureau.

If the notice of the appeal is sent to the International Bureau, the Bureau will immediately inform the National Court, when possible by telegraph. The latter will transmit the record as provided in the preceding paragraph.

When the appeal is brought by a neutral individual the International Bureau at once informs by telegraph the individual's Government, in order to enable it to enforce the rights it enjoys under Article 4, paragraph 2.

Art. 30. In the case provided for in Article 6, paragraph 2, the notice of appeal can be addressed to the International Bureau only. It must be entered within thirty days of the expiration of the period of two years.

Art. 31. If the appellant does not enter his appeal within the period laid down in Articles 28 or 30, it shall be rejected without discussion.

Provided that he can show that he was prevented from so doing by force majeure, and that the appeal was entered within sixty days after the circumstances which prevented him entering it before had ceased to operate, the Court can, after hearing the respondent, grant relief from the effect of the above provision.

Art. 32. If the appeal is entered in time, a certified copy of the notice of appeal is forthwith officially transmitted by the Court to the respondent.

Art. 33. If, in addition to the parties who are before the Court, there are other parties concerned who are entitled to appeal, or if in the case referred to in Article 29, paragraph 3, the Government who has received notice of an appeal has not announced its decision, the Court will await before dealing with the case the expiration of the period laid down in Articles 28 or 30.

Art. 34. The procedure before the International Court includes two distinct parts: the written pleadings and oral discussions.

The written pleadings consist of the deposit and exchange of cases, counter-cases, and, if necessary, of replies, of which the order is fixed by the Court, as also the periods within which they must be delivered. The parties annex thereto all papers and documents of which they intend to make use.

A certified copy of every document produced by one party must be communicated to the other party through the medium of the Court.

Art. 35. After the close of the pleadings, a public sitting is held on a day fixed by the Court.

At this sitting the parties state their view of the case both as to the law and as to the facts.

The Court may, at any stage of the proceedings, suspend speeches of counsel, either at the request of one of the parties, or on their own initiative, in order that supplementary evidence may be obtained.

Art. 36. The International Court may order the supplementary evidence to be taken either in the manner provided by Article 27, or before itself, or one or more of the members of the Court, provided that this can be done without resort to compulsion or the use of threats.

If steps are to be taken for the purpose of obtaining evidence by members of the Court outside the territory where it is sitting, the consent of the foreign Government must be obtained.

Art. 37. The parties are summoned to take part in all stages of the proceedings and receive certified copies of the Minutes.

Art. 38. The discussions are under the control of the President or Vice-President, or, in case they are absent or cannot act, of the senior Judge present.

The Judge appointed by a belligerent party cannot preside.

Art. 39. The discussions take place in public, subject to the right of a Government who is a party to the case to demand that they be held in private.

Minutes are taken of these discussions and signed by the President and Registrar, and these Minutes alone have an authentic character.

Art. 40. If a party does not appear, despite the fact that he has been duly cited, or if a party fails to comply with some step within the period fixed by the Court, the case proceeds without that party, and the Court gives judgment in accordance with the material at its disposal.

Art. 41. The Court officially notifies to the parties Decrees or decisions made in their absence.

Art. 42. The Court takes into consideration in arriving at its decision all the facts, evidence, and oral statements.

Art. 43. The Court considers its decision in private and the proceedings are secret.

All questions are decided by a majority of the Judges present. If the number of Judges is even and equally divided, the vote of the junior Judge in the order of precedence laid down in Article 12, paragraph 1, is not counted.

Art. 44. The judgment of the Court must give the reasons on which it is based. It contains the names of the Judges taking part in it, and also of the Assessors, if any; it is signed by the President and Registrar.

Art. 45. The sentence is pronounced in public sitting, the parties concerned being present or duly summoned to attend; the sentence is officially communicated to the parties.

When this communication has been made, the Court transmits to the National Prize Court the record of the case, together with copies of the various decisions arrived at and of the Minutes of the proceedings.

Art. 46. Each party pays its own costs.

The party against whom the Court decides bears, in addition, the costs of the trial, and also pays 1 per cent. of the value of the subject-matter of the case as a contribution to the general expenses of the International Court. The amount of these payments is fixed in the judgment of the Court.

If the appeal is brought by an individual, he will furnish the International Bureau with security to an amount fixed by the Court, for the purpose of guaranteeing eventual fulfillment of the two obligations mentioned in the preceding paragraph. The Court is entitled to postpone the opening of the proceedings until the security has been furnished.

Art. 47. The general expenses of the International Prize Court are borne by the Contracting Powers in proportion to their share in the composition of the Court as laid down in Article 15 and in the annexed Table. The appointment of Deputy Judges does not involve any contribution.

The Administrative Council applies to the Powers for the funds requisite for the working of the Court.

Art. 48. When the Court is not sitting the duties conferred upon it by Article 32, Article 34, paragraphs 2 and 3, Article 35, paragraph 1, and Article 46, paragraph 3, are discharged by a delegation of three Judges appointed by the Court. This delegation decides by a majority of votes.

Art. 49. The Court itself draws up its own rules of procedure, which must be communicated to the Contracting Powers.

It will meet to elaborate these rules within a year of the ratification of the present Convention.

Art. 50. The Court may propose modifications in the provisions of the present Convention concerning procedure. These proposals are communicated, through the medium of the Netherlands Government, to the Contracting Powers, which will consider together as to the measures to be taken.

PART IV.—FINAL PROVISIONS.

Art. 51. The present Convention does not apply as of right except when the belligerent Powers are all parties to the Convention.

It is further fully understood that an appeal to the International Prize Court can only be brought by a Contracting Power or the subject or citizen of a Contracting Power.

In the cases mentioned in Article 5, the appeal is only admitted when both the owner and the person entitled to represent him are equally Contracting Powers or the subjects or citizens of Contracting Powers.

[Articles providing for ratification follow.]

ANNEX TO ARTICLE XV.

Distribution of Judges and Deputy Judges by Countries for Each Year of the Period of Six Years.

	Judges.	Deputy Judges.	Judges.	Deputy Judges.
	<i>First Year.</i>		<i>Second Year.</i>	
1	Argentina	Paraguay.	Argentina	Panama.
2	Columbia	Bolivia.	Spain	Spain.
3	Spain	Spain.	Greece	Roumania.
4	Greece	Roumania.	Norway	Sweden.
5	Norway	Sweden.	Netherlands	Belgium.
6	Netherlands	Belgium.	Turkey	Luxemburg.
7	Turkey	Persia.	Uruguay	Costa Rica.
	<i>Third Year.</i>		<i>Fourth Year.</i>	
1	Brazil	Santo Domingo.	Brazil	Guatemala.
2	China	Turkey.	China	Turkey.
3	Spain	Portugal.	Spain	Portugal.
4	Netherlands	Switzerland.	Peru	Honduras.
5	Roumania	Greece.	Roumania	Greece.
6	Sweden	Denmark.	Sweden	Denmark.
7	Venezuela	Haiti.	Switzerland	Netherlands.
	<i>Fifth Year.</i>		<i>Sixth Year.</i>	
1	Belgium	Netherlands.	Belgium	Netherlands.
2	Bulgaria	Montenegro.	Chile	Salvador.
3	Chile	Nicaragua.	Denmark	Norway.
4	Denmark	Norway.	Mexico	Ecuador.
5	Mexico	Cuba.	Portugal	Spain.
6	Persia	China.	Servia	Bulgaria.
7	Portugal	Spain.	Siam	China.

CONVENTION CONCERNING THE RIGHTS AND DUTIES OF NEUTRAL POWERS IN NAVAL WAR.

[Names of States.]

With a view to harmonizing the divergent views which, in the event of naval war, are still held on the relations between neutral Powers and belligerent Powers, and to anticipating the difficulties to which such divergence of views might give rise,

Seeing that, even if it is not possible at present to concert measures applicable to all circumstances which may in practice occur, it is nevertheless undeniably advantageous to frame, as far as possible, rules of general application to meet the case where war has unfortunately broken out;

Seeing that, in cases not covered by the present Convention, it is expedient to take into consideration the general principles of the law of nations;

Seeing that it is desirable that the Powers should issue detailed enactments to regulate the results of the attitude of neutrality when adopted by them;

Seeing that it is, for neutral Powers, an admitted duty to apply these rules impartially to the several belligerents;

Seeing that, in this category of ideas these rules should not, in principle, be altered, in the course of the war, by a neutral Power, except in a case where experience has shown the necessity for such change for the protection of the rights of that Power;

Have agreed to observe the following common rules, which cannot however modify provisions laid down in existing general Treaties, and have appointed as their Plenipotentiaries, namely:

[Names of Plenipotentiaries.]

Who, after having deposited their full powers, found in good and due form, have agreed upon the following provisions:

Article 1. Belligerents are bound to respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any Power, constitute a violation of neutrality.

Art. 2. Any act of hostility, including capture and the exercise of the right of search, committed by belligerent war-ships in the territorial waters of a neutral Power, constitutes a violation of neutrality and is strictly forbidden.

Art. 3. When a ship has been captured in the territorial waters of a neutral Power, this Power must employ, if the prize is still

within its jurisdiction, the means at its disposal to release the prize with its officers and crew, and to intern the prize crew.

If the prize is not in the jurisdiction of the neutral Power, the captor Government, on the demand of that Power, must liberate the prize with its officers and crew.

Art. 4. A Prize Court cannot be set up by a belligerent on neutral territory or on a vessel in neutral waters.

Art. 5. Belligerents are forbidden to use neutral ports and waters as a base of naval operations against their adversaries, and in particular to erect wireless telegraphy stations or any apparatus for the purpose of communicating with the belligerent forces on land or sea.

Art. 6. The supply, in any manner, directly or indirectly, by a neutral Power to a belligerent Power, of war-ships, ammunition, or war material of any kind whatever, is forbidden.

Art. 7. A neutral Power is not bound to prevent the export or transit, for the use of either belligerent, of arms, ammunitions, or, in general, of anything which could be of use to an army or fleet.

Art. 8. A neutral Government is bound to employ the means at its disposal to prevent the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to cruise, or engage in hostile operations, against a Power with which that Government is at peace. It is also bound to display the same vigilance to prevent the departure from its jurisdiction of any vessel intended to cruise, or engage in hostile operations, which had been adapted entirely or partly within the said jurisdiction for use in war.

Art. 9. A neutral Power must apply impartially to the two belligerents the conditions, restrictions, or prohibitions made by it in regard to the admission into its ports, roadsteads, or territorial waters, of belligerent war-ships or of their prizes.

Nevertheless, a neutral Power may forbid a belligerent vessel which has failed to conform to the orders and regulations made by it, or which has violated neutrality, to enter its ports or roadsteads.

Art. 10. The neutrality of a Power is not affected by the mere passage through its territorial waters of war-ships or prizes belonging to belligerents.

Art. 11. A neutral Power may allow belligerent war-ships to employ its licensed pilots.

Art. 12. In the absence of special provisions to the contrary in the legislation of a neutral Power, belligerent war-ships are not permitted to remain in the ports, roadsteads, or territorial waters of the said Power for more than twenty-four hours, except in the cases covered by the present Convention.

Art. 13. If a Power which has been informed of the outbreak of hostilities learns that a belligerent war-ship is in one of its ports or roadsteads, or in its territorial waters, it must notify the said ship to depart within twenty-four hours or within the time prescribed by local regulations.

Art. 14. A belligerent war-ship may not prolong its stay in a neutral port beyond the permissible time except on account of damage or stress of weather. It must depart as soon as the cause of the delay is at an end.

The regulations as to the question of the length of time which these vessels may remain in neutral ports, roadsteads, or waters, do not apply to war-ships devoted exclusively to religious, scientific, or philanthropic purposes.

Art. 15. In the absence of special provisions to the contrary in the legislation of a neutral Power, the maximum number of war-ships belonging to a belligerent which may be in one of the ports or roadsteads of that Power simultaneously shall be three.

Art. 16. When war-ships belonging to both belligerents are present simultaneously in a neutral port or roadstead, a period of not less than twenty-four hours must elapse between the departure of the ship belonging to one belligerent and the departure of the ship belonging to the other.

The order of departure is determined by the order of arrival, unless the ship which arrived first is so circumstanced that an extension of its stay is permissible.

A belligerent war-ship may not leave a neutral port or roadstead until twenty-four hours after the departure of a merchant-ship flying the flag of its adversary.

Art. 17. In neutral ports and roadsteads belligerent war-ships may only carry out such repairs as are absolutely necessary to render them seaworthy, and may not add in any manner whatsoever to their fighting force. The local authorities of the neutral Power shall decide what repairs are necessary, and these must be carried out with the least possible delay.

Art. 18. Belligerent war-ships may not make use of neutral ports, roadsteads, or territorial waters for replenishing or increasing their supplies of war material or their armament, or for completing their crews.

Art. 19. Belligerent war-ships may only revictual in neutral ports or roadsteads to bring up their supplies to the peace standard.

Similarly these vessels may only ship sufficient fuel to enable them to reach the nearest port in their own country. They may, on the other hand, fill up their bunkers built to carry fuel, when in neutral countries which have adopted this method of determining the amount of fuel to be supplied.

If, in accordance with the law of the neutral Power, the ships are not supplied with coal within twenty-four hours of their arrival, the permissible duration of their stay is extended by twenty-four hours.

Art. 20. Belligerent war-ships which have shipped fuel in a port belonging to a neutral Power may not within the succeeding three months replenish their supply in a port of the same Power.

Art. 21. A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions.

It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral Power must order it to leave at once; should it fail to obey, the neutral Power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew.

Art. 22. A neutral Power must similarly, release a prize brought into one of its ports under circumstances other than those referred to in Article 21.

Art. 23. A neutral Power may allow prizes to enter its ports and roadsteads, whether under convoy or not, when they are brought there to be sequestered pending the decision of a Prize Court. It may have the prize taken to another of its ports.

If the prize is convoyed by a war-ship, the prize crew may go on board the convoying ship.

If the prize is not under convoy, the prize crew are left at liberty.

Art. 24. If notwithstanding the notification of the neutral Power, a belligerent ship of war does not leave a port where it is not entitled to remain, the neutral Power is entitled to take such measures as it considers necessary to render the ship incapable of taking the sea during the war, and the commanding officer of the ship must facilitate the execution of such measures.

When a belligerent ship is detained by a neutral Power, the officers and crew are likewise detained.

The officers and crew thus detained may be left in the ship or kept either on another vessel or on land, and may be subjected to the measures of restriction which it may appear necessary to impose upon them. A sufficient number of men for looking after the vessel must, however, be always left on board.

The officers may be left at liberty on giving their word not to quit the neutral territory without permission.

Art. 25. A neutral Power is bound to exercise such surveillance as the means at its disposal allow to prevent any violation of the provisions of the above Articles occurring in its ports or roadsteads or in its waters.

Art. 26. The exercise by a neutral Power of the rights laid down in the present Convention can under no circumstances be considered as an unfriendly act by one or other belligerent who has accepted the Article relating thereto.

Art. 27. The Contracting Powers shall communicate to each other in due course all Laws, Proclamations, and other enactments regulating in their respective countries the status of belligerent war-ships in their ports and waters, by means of a communication addressed to the Government of the Netherlands and forwarded immediately by that Government to the other Contracting Powers.

Art. 28. The provisions of the present Convention do not apply except to the Contracting Powers, and then only if all the belligerents are parties to the Convention.

[Articles providing for ratification follow.]

[Reservation by the United States.]

Resolved (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the adherence of the United States to a convention adopted by the Second International Peace Conference held at The Hague from June 15 to October 18, 1907, concerning the rights and duties of neutral powers in naval war, reserving and excluding, however, Article 23 thereof, which is in the following words:

"A neutral power may allow prizes to enter its ports and roadsteads, whether under convoy or not, when they are brought there to be sequestered pending the decision of a prize court. It may have the prize taken to another of its ports.

"If the prize is convoyed by a war-ship, the prize crew may go on board the convoying ship.

"If the prize is not under convoy, the prize crew are left at liberty."

Resolved, further, That the United States adheres to this convention with the understanding that the last clause of Article 3 implies the duty of a neutral power to make the demand therein mentioned for the return of a ship captured within the neutral jurisdiction and no longer within that jurisdiction.

DRAFT CONVENTION RELATIVE TO THE CREATION OF A COURT OF ARBITRAL JUSTICE.

TITLE I.—CONSTITUTION OF THE COURT OF ARBITRAL JUSTICE.

Article I. With a view to promoting the cause of arbitration, the Contracting Powers agree to constitute, without altering the status of the Permanent Court of Arbitration, a Court of Arbitral Justice, of free and easy access, composed of Judges representing the various juridical systems of the world, and capable of insuring continuity in arbitral jurisprudence.

Art. II. The Court of Arbitral Justice is composed of Judges and Deputy Judges chosen from persons of the highest moral reputation, and all fulfilling conditions qualifying them, in their respective countries, to occupy high legal posts, or be jurists of recognized competence in matters of international law.

The Judges and Deputy Judges of the Court are appointed, as far as possible, from the members of the Permanent Court of Arbitration. The appointment shall be made within the six months after the ratification of the present Convention.

Art. III. The Judges and Deputy Judges are appointed for a period of twelve years, reckoned from the date on which the appointment is notified to the Administrative Council created by the Convention for the Pacific Settlement of International Disputes. Their appointments can be renewed.

Should a Judge or Deputy Judge die or resign, the vacancy is filled in the manner in which his appointment was made. In this case, the appointment is made for a fresh period of twelve years.

Art. IV. The Judges of the Court of Arbitral Justice are equal and rank according to the date on which their appointment was notified. The Judge who is senior in point of age takes precedence when the date of notification is the same.

The Deputy Judges are assimilated in the exercise of their functions to the Judges. They rank, however, after the latter.

Art. V. The Judges enjoy diplomatic privileges and immunities in the exercise of their duties and when outside their own country.

Before taking their seat, the Judges and Deputy Judges must swear, before the Administrative Council, or make a solemn affirmation to exercise their functions impartially and conscientiously.

Art. VI. The Court annually nominates three Judges to form a special Delegation and three more to replace them if the former are unable to act. They may be re-elected. They are balloted for.

The persons who secure the largest number of votes are considered elected. The Delegation itself elects its President, who, in default of a majority, is appointed by lot.

A member of the Delegation cannot exercise his duties when the Power which appointed him, or of which he is a national, is one of the parties.

The members of the Delegation are to conclude matters submitted to them, even if the period for which they have been appointed Judges has expired.

Art. VII. A Judge may not exercise his judicial functions in any case in which he has, in any way whatever, taken part in the decision of a National Tribunal, of a Tribunal of Arbitration, or of a Commission of Inquiry, or has figured in the suit as counsel or advocate for one of the parties.

A Judge cannot act as agent or advocate before the Court of Arbitral Justice or the Permanent Court of Arbitration, before a Special Tribunal of Arbitration or a Commission of Inquiry, nor act therein for one of the parties in any capacity whatsoever so long as his appointment lasts.

Art. VIII. The Court elects its President and Vice-President by an absolute majority of the votes cast. After two ballots, the election is made by a bare majority and, in case the votes are even, by lot.

Art. IX. The Judges of the Court of Arbitral Justice receive an annual salary of 6,000 Netherland florins. This salary is paid at the end of each half-year, reckoned from the date on which the Court meets for the first time.

In the exercise of their duties during the sessions or in the special cases covered by the present Convention, they receive the sum of 100 florins per diem. They are further entitled to receive a travelling allowance fixed in accordance with regulations existing in their own country. The provisions of the present paragraph are applicable also to a Deputy Judge when acting for a Judge.

These emoluments are included in the general expenses of the Court dealt with in Article XXXI, and are paid through the International Bureau created by the Convention for the Pacific Settlement of International Disputes.

Art. X. The Judges may not accept from their own Government or from that of any other Power any remuneration for services connected with their duties in their capacity of members of the Court.

Art. XI. The seat of the Court of Arbitral Justice is at The Hague, and cannot except in the case of force majeure be transferred elsewhere.

The Delegation may choose, with the assent of the parties concerned, another site for its meetings, if special circumstances render such a step necessary.

Art. XII. The Administrative Council fulfills with regard to the Court of Arbitral Justice the same functions as to the Permanent Court of Arbitration.

Art. XIII. The International Bureau acts as registry to the Court of Arbitral Justice, and must place its offices and staff at the disposal of the Court. It has charge of the archives and carries out the administrative work.

The Secretary-General of the Bureau discharges the functions of Registrar.

The necessary secretaries to assist the Registrar, translators and shorthand writers are appointed and sworn in by the Court.

Art. XIV. The Court meets in session once a year. The session opens the third Wednesday in June and lasts until all the business on the agenda has been transacted.

The Court does not meet in session if the Delegation considers that such meeting is unnecessary. However, when a Power is party in a case actually pending before the Court, the pleadings in which are closed, or about to be closed, it may insist that the session should be held.

When necessary, the Delegation may summon the Court in extraordinary session.

Art. XV. A Report of the doings of the Court shall be drawn up every year by the Delegation. This Report shall be forwarded to the Contracting Powers through the International Bureau. It shall also be communicated to the Judges and Deputy Judges of the Court.

Art. XVI. The Judges and Deputy Judges, members of the Court of Arbitral Justice can also exercise the functions of Judge and Deputy Judge in the International Prize Court.

TITLE II.—COMPETENCY AND PROCEDURE.

Art. XVII. The Court of Arbitral Justice is competent to deal with all cases submitted to it, in virtue either of a general undertaking to have recourse to arbitration or of a special agreement.

Art. XVIII. The Delegation is competent—

1. To decide the arbitrations referred to in the preceding Article, if the parties concerned are agreed that the summary procedure, laid down in Part IV, Chapter IV, of the Convention for the Pacific Settlement of International Disputes is to be applied;

2. To hold an inquiry under and in accordance with Part III of the said Convention, in so far as the Delegation is intrusted with such inquiry by the parties acting in common agreement. With the assent of the parties concerned, and as an exception to Article VII, paragraph 1, the members of the Delegation who have taken part in the inquiry may sit as Judges, if the case in dispute is submitted to the arbitration of the Court or of the Delegation itself.

Art. XIX. The Delegation is also competent to settle the Compromis referred to in Article LII of the Convention for the Pacific Settlement of International Disputes if the parties are agreed to leave it to the Court.

It is equally competent to do so, even when the request is only made by one of the parties concerned, if all attempts have failed to reach an understanding through the diplomatic channel, in the case of—

1. A dispute covered by a general Treaty of Arbitration concluded or renewed after the present Convention has come into force, providing for a Compromis in all disputes, and not either explicitly or implicitly excluding the settlement of the Compromis from the competence of the Delegation. Recourse cannot, however, be had to the Court if the other party declares that in its opinion the dispute does not belong to the category of questions to be submitted to obligatory arbitration, unless the Treaty of Arbitration confers upon the Arbitration Tribunal the power of deciding this preliminary question.

2. A dispute arising from contract debts claimed from one Power by another Power as due to its nationals, and for the settlement of which the offer of arbitration has been accepted. This arrangement is not applicable if acceptance is subject to the condition that the Compromis should be settled in some other way.

Art. XX. Each of the parties concerned may nominate a Judge of the Court to take part, with power to vote, in the examination of the case submitted to the Delegation.

If the Delegation acts as a Commission of Enquiry, this task may be intrusted to persons other than the Judges of the Court. The travelling expenses and remuneration to be given to the said persons are fixed and borne by the Powers appointing them.

Art. XXI. The Contracting Powers only may have access to the Court of Arbitral Justice set up by the present Convention.

Art. XXII. The Court of Arbitral Justice follows the rules of procedure laid down in the Convention for the Pacific Settlement of International Disputes, except in so far as the procedure is laid down in the present Convention.

Art. XXIII. The Court determines what language it will itself use and what languages may be used before it.

Art. XXIV. The International Bureau serves as channel for all communications to be made to the Judges during the interchange of pleadings provided for in Article LXIII, paragraph 2, of the Convention for the Pacific Settlement of International Disputes.

Art. XXV. For all notices to be served, in particular on the parties, witnesses, or experts, the Court may apply direct to the Government of the State on whose territory the service is to be carried out. The same rule applies in the case of steps being taken to procure evidence.

The requests addressed for this purpose can only be rejected when the Power applied to considers them likely to impair its sovereign rights or its safety. If the request is complied with, the fees charged must only comprise the expenses actually incurred.

The Court is equally entitled to act through the Power on whose territory it sits.

Notices to be given to parties in the place where the Court sits may be served through the International Bureau.

Art. XXVI. The discussions are under the control of the President or Vice-President, or, in case they are absent or cannot act, of the senior Judge present.

The Judge appointed by one of the parties cannot preside.

Art. XXVII. The Court considers its decisions in private, and the proceedings remain secret.

All decisions are arrived at by a majority of the Judges present. If the number of Judges is even and equally divided, the vote of the junior Judge, in the order of precedence laid down in Article IV, paragraph 1, is not counted.

Art. XXVIII. The judgments of the Court must give the reasons on which they are based. They contain the names of the Judges taking part in them; they are signed by the President and by the Registrar.

Art. XXIX. Each party pays its own costs and an equal share of the costs of the trial.

Art. XXX. The provisions of Articles XXI to XXIX are applicable by analogy to the procedure before the Delegation.

When the right of attaching a member to the delegation has been exercised by one of the parties only, the vote of the member attached is not recorded if the votes are evenly divided.

Art. XXXI. The general expenses of the Court are borne by the Contracting Powers.

The Administrative Council applies to the Powers to obtain the funds requisite for the working of the Court.

Art. XXXII. The Court itself draws up its own rules of procedure, which must be communicated to the Contracting Powers.

After the ratification of the present Convention the Court shall meet as early as possible in order to elaborate these rules, elect the President and Vice-President, and appoint the members of the Delegation.

Art. XXXIII. The Court may propose modifications in the provisions of the present Convention concerning procedure. These proposals are communicated through the Netherland Government to the Contracting Powers, which will consider together as to the measures to be taken.

TITLE III.—FINAL PROVISIONS.

Art. XXXIV. The present Convention shall be ratified as soon as possible.

The ratifications shall be deposited at The Hague.

A procès-verbal of the deposit of each ratification shall be drawn up, of which a duly certified copy shall be sent through the diplomatic channel to all the Signatory Powers.

Art. XXXV. The Convention shall come into force six months after its ratification.

It shall remain in force for twelve years, and shall be tacitly renewed for periods of twelve years, unless denounced.

The denunciation must be notified, at least two years before the expiration of each period, to the Netherland Government, which will inform the other Powers.

The denunciation shall only have effect in regard to the notifying Power. The Convention shall continue in force as far as the other Powers are concerned.

APPENDIX V

DECLARATION OF LONDON, FEBRUARY 26, 1909

[Translation.] ²

DECLARATION CONCERNING THE LAWS OF NAVAL WAR.

His Majesty the German Emperor, King of Prussia; the President of the United States of America; His Majesty the Emperor of Austria, King of Bohemia, &c., and Apostolic King of Hungary; His Majesty the King of Spain; the President of the French Republic; His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominion beyond the Seas, Emperor of India; His Majesty the King of Italy; His Majesty the Emperor of Japan; Her Majesty the Queen of the Netherlands; His Majesty the Emperor of All the Russias;

Considering the invitation which the British Government has given to various Powers to meet in conference in order to determine together as to what are the generally recognized rules of international law within the meaning of Article 7 of the Convention of 18th October, 1907, relative to the establishment of an International Prize Court;

Recognizing all the advantages which, in the unfortunate event of a naval war an agreement as to said rules would present, both as regards peaceful commerce, and as regards the belligerents and their diplomatic relations with neutral Governments;

Considering that the general principles of international law are often in their practical application the subject of divergent procedure;

Animated by the desire to insure henceforward a greater measure of uniformity in this respect;

Hoping that a work so important to the common welfare will meet with general approval;

Have appointed as their Plenipotentiaries, that is to say:

[Names of Plenipotentiaries.]

Who, after having communicated their full powers found in good and due form, have agreed to make the present Declaration:

²The official text of this Declaration is in the French language.

PRELIMINARY PROVISION.

The Signatory Powers are agreed that the rules contained in the following chapters correspond in substance with the generally recognized principles of international law.

CHAPTER I.—BLOCKADE IN TIME OF WAR.

Article 1. A blockade must be limited to the ports and coasts belonging to or occupied by the enemy.

Art. 2. In accordance with the Declaration of Paris, 1856, a blockade, in order to be binding, must be effective—that is to say, it must be maintained by a force sufficient really to prevent access to the enemy coast.

Art. 3. The question whether a blockade is effective is a question of fact.

Art. 4. A blockade is not regarded as raised if by bad weather the blockading forces are temporarily driven off.

Art. 5. A blockade must be applied impartially to the ships of all nations.

Art. 6. The commander of a blockading force may grant to a warship permission to enter, and subsequently to leave, a blockaded port.

Art. 7. In circumstances of distress, acknowledged by an authority of the blockading forces, a neutral vessel may enter a place under blockade and subsequently leave it, provided that she has neither discharged nor shipped any cargo.

Art. 8. A blockade, in order to be binding must be declared in accordance with Article 9, and notified in accordance with Articles 11 and 16.

Art. 9. A declaration of blockade is made either by the blockading Power or by the naval authorities acting in its name.

It specifies—

(1) The date when the blockade begins.

(2) The geographical limits of the coast blockaded.

(3) The delay to be allowed to neutral vessels for departure.

Art. 10. If the blockading Power, or the naval authorities acting in its name, do not establish the blockade in conformity with the provisions, which, in accordance with Article 9 (1) and (2), must be inserted in the declaration of blockade, the declaration is void, and a new declaration is necessary in order to make the blockade operative.

Art. 11. A declaration of blockade is notified—

(1) To the neutral Powers, by the blockading Power by means of a communication addressed to the Governments themselves, or to their Representatives accredited to it.

(2) To the local authorities, by the officer commanding the blockading force. These authorities will, on their part, inform, as soon as possible, the foreign consuls who exercise their functions in the port or on the coast blockaded.

Art. 12. The rules relative to the declaration and to the notification of blockade are applicable in the case in which the blockade may have been extended, or may have been re-established after having been raised.

Art. 13. The voluntary raising of a blockade, as also any limitation which may be introduced, must be notified in the manner prescribed by Article 11.

Art. 14. The liability of a neutral vessel to capture for breach of blockade is contingent on her knowledge, actual or presumptive, of the blockade.

Art. 15. Failing proof to the contrary, knowledge of the blockade is presumed if the vessel left a neutral port subsequently to the notification of the blockade made in sufficient time to the Power to which such port belongs.

Art. 16. If a vessel which approaches a blockaded port does not know, or cannot be presumed to know, of the blockade, the notification must be made to the vessel itself by an officer of one of the ships of the blockading force. This notification must be entered in the ship's log-book, with entry of the day and hour, as also of the geographical position of the vessel at the time.

A neutral vessel which leaves a blockaded port must be allowed to pass free, if through the negligence of the officer commanding the blockading force, no declaration of blockade has been notified to the local authorities, or, if in the declaration, as notified, no delay has been indicated.

Art. 17. The seizure of neutral vessels for violation of blockade may be made only within the radius of action of the ships of war assigned to maintain an effective blockade.

Art. 18. The blockading forces must not bar access to the ports or to the coasts of neutrals.

Art. 19. Whatever may be the ulterior destination of the ship or of her cargo, the evidence of violation of blockade is not sufficiently conclusive to authorize the seizure of the ship if she is at the time bound toward an unblockaded port.

Art. 20. A vessel which in violation of blockade has left a blockaded port or has attempted to enter the port is liable to capture so long as she is pursued by a ship of the blockading force. If the pursuit is abandoned, or if the blockade is raised, her capture can no longer be effected.

Art. 21. A vessel found guilty of breach of blockade is liable to condemnation. The cargo is also liable to condemnation, unless it is proved that at the time the goods were shipped the shipper neither knew nor could have known of the intention to violate the blockade.

CHAPTER II.—CONTRABAND OF WAR.

Art. 22. The following articles and materials are, without notice, regarded as contraband, under the name of absolute contraband:

1. Arms of all kinds, including arms for sporting purposes, and their unassembled distinctive parts.

2. Projectiles, charges, and cartridges of all kinds, and their unassembled distinctive parts.

3. Powder and explosives specially adapted for use in war.

4. Gun carriages, caissons, limbers, military wagons, field forges, and their unassembled distinctive parts.

5. Clothing and equipment of a distinctively military character.

6. All kinds of harness of a distinctively military character.

7. Saddle, draught, and pack animals suitable for use in war.

8. Articles of camp equipment and their unassembled distinctive parts.

9. Armor plates.

10. War-ships and boats and their unassembled parts specially distinctive as suitable for use only on a vessel of war.

11. Implements and apparatus made exclusively for the manufacture of munitions of war, for the manufacture or repair of arms or of military material, for use on land and sea.

Art. 23. Articles and materials which are exclusively used for war may be added to the list of absolute contraband by means of a notified declaration.

The notification is addressed to the Governments of other Powers or to their Representatives accredited to the Power which makes the declaration. A notification made after the opening of hostilities is addressed only to the neutral Powers.

Art. 24. The following articles and materials, susceptible of use in war as well as for purposes of peace, are without notice regarded as contraband of war, under the name of conditional contraband:

(1) Food.

(2) Forage and grain suitable for feeding animals.

(3) Clothing and fabrics for clothing, boots and shoes, suitable for military use.

(4) Gold and silver in coin or bullion; paper money.

(5) Vehicles of all kinds available for use in war, and their unassembled parts.

(6) Vessels, craft, and boats of all kinds, floating docks, parts of docks as also their unassembled parts.

(7) Fixed railway material and rolling stock, and material for telegraphs, radio-telegraphs and telephones.

(8) Balloons and flying machines and their unassembled distinctive parts as also their accessories, articles and materials distinctive as intended for use in connection with balloons or flying machines.

(9) Fuel; lubricants.

(10) Powder and explosives which are not specially adapted for use in war.

(11) Barbed wire as also the implements for placing and cutting the same.

(12) Horseshoes and horseshoeing materials.

(13) Harness and saddlery material.

(14) Binocular glasses, telescopes, chronometers, and all kinds of nautical instruments.

Art. 25. Articles and materials susceptible of use in war as well as for purposes of peace, and other than those enumerated in Articles 22 and 24, may be added to the list of conditional contraband by means of a declaration which must be notified in the manner provided for in the second paragraph of Article 23.

Art. 26. If a Power waives, so far as it is concerned, the right to regard as contraband of war articles and materials which are comprised in any of the classes enumerated in Articles 22 and 24, it shall make known its intention by a declaration notified in the manner provided for in the second paragraph of Article 23.

Art. 27. Articles and materials, which are not susceptible of use in war, are not to be declared contraband of war.

Art. 28. The following articles are not to be declared contraband of war:

(1) Raw cotton, wool, silk, jute, flax, hemp, and other raw materials of the textile industries, and also yarns of the same.

(2) Nuts and oil seeds; copra.

(3) Rubber, resins, gums and lacs; hops.

(4) Raw hides, horns, bones, and ivory.

(5) Natural and artificial manures, including nitrates and phosphates for agricultural purposes.

(6) Metallic ores.

(7) Earths, clays, lime, chalk, stone, including marble, bricks, slates and tiles.

(8) Chinaware and glass.

(9) Paper and materials prepared for its manufacture.

(10) Soap, paint and colors, including articles exclusively used in their manufacture, and varnishes.

(11) Bleaching powder, soda ash, caustic soda, salt cake, ammonia, sulphate of ammonia, and sulphate of copper.

(12) Agricultural, mining, textile, and printing machinery.

(13) Precious stones, semi-precious stones, pearls, mother-of-pearl, and coral.

(14) Clocks and watches, other than chronometers.

(15) Fashion and fancy goods.

(16) Feathers of all kinds, hairs, and bristles.

(17) Articles of household furniture and decorations; office furniture and accessories.

Art. 29. Neither are the following to be regarded as contraband of war:

(1) Articles and materials serving exclusively for the care of the sick and wounded. They may, nevertheless, in case of urgent military necessity and subject to the payment of compensation, be requisitioned, if their destination is that specified in Article 30.

(2) Articles and materials intended for the use of the vessel in which they are found, as well as those for the use of her crew and passengers during the voyage.

Art. 30. Absolute contraband is liable to capture if it is shown to be destined to territory belonging to or occupied by the enemy, or to the armed forces of the enemy. It is immaterial whether the carriage of the goods is direct or entails either transshipment or transport over land.

Art. 31. Proof of the destination specified in Article 30 is complete in the following cases:

(1) When the goods are documented to be discharged in a port of the enemy, or to be delivered to his armed forces.

(2) When the vessel is to call at enemy ports only, or when she is to touch at a port of the enemy or to join his armed forces, before arriving at the neutral port for which the goods are documented.

Art. 32. The ship's papers are complete proof of the voyage of a vessel transporting absolute contraband, unless the vessel is encountered having manifestly deviated from the route which she ought to follow according to the ship's papers and being unable to justify by sufficient reason such deviation.

Art. 33. Conditional contraband is liable to capture if it is shown that it is destined for the use of the armed forces or of a government department of the enemy State, unless in this latter case the circumstances show that the articles cannot in fact be used for the purposes of the war in progress. This latter exception does not apply to a consignment coming under Article 24 (4).

Art. 34. There is presumption of the destination referred to in Article 33 if the consignment is addressed to enemy authorities, or to a merchant, established in the enemy country, and when it is well known that this merchant supplies articles and material of this kind to the enemy. The presumption is the same if the consignment is destined to a fortified place of the enemy, or to another place serving as a base for the armed forces of the enemy; this presumption, however, does not apply to the merchant vessel herself bound for one of these places and of which vessel it is sought to show the contraband character.

Failing the above presumptions, the destination is presumed innocent.

The presumptions laid down in this Article admit proof to the contrary.

Art. 35. Conditional contraband is not liable to capture, except when on board a vessel bound for territory belonging to or occupied by the enemy, or for the armed forces of the enemy, and is not to be discharged at an intervening neutral port.

The ship's papers are conclusive proof of the voyage of the vessel as also of the port of discharge of the goods, unless the vessel is encountered having manifestly deviated from the route which she

ought to follow according to the ship's papers and being unable to justify by sufficient reason such deviation.

Art. 36. Notwithstanding the provisions of Article 35, if the territory of the enemy has no seaboard, conditional contraband is liable to capture if it is shown that it has the destination referred to in Article 33.

Art. 37. A vessel carrying articles liable to capture as absolute or conditional contraband may be captured on the high seas or in the territorial waters of the belligerents throughout the whole course of her voyage, even if she has the intention to touch at a port of call before reaching the hostile destination.

Art. 38. A capture is not to be made on the ground of a carriage of contraband previously accomplished and at the time completed.

Art. 39. Contraband is liable to condemnation.

Art. 40. The confiscation of the vessel carrying contraband is allowed if the contraband forms, either by value, by weight, by volume, or by freight, more than half the cargo.

Art. 41. If a vessel carrying contraband is released, the expenses incurred by the captor in the trial before the national prize court as also for the preservation and custody of the ship and cargo during the proceedings are chargeable against the ship.

Art. 42. Goods which belong to the owner of the contraband and which are on board the same vessel are liable to condemnation.

Art. 43. If a vessel is encountered at sea making a voyage in ignorance of the hostilities or of the declaration of contraband affecting her cargo, the contraband is not to be condemned except with indemnity; the vessel herself and the remainder of the cargo are exempt from condemnation and from the expenses referred to in Article 41. The case is the same if the master after becoming aware of the opening of hostilities, or of the declaration of contraband, has not yet been able to discharge the contraband.

A vessel is deemed to be aware of the state of war, or of the declaration of contraband, if she left a neutral port after there had been made in sufficient time the notification of the opening of hostilities, or of the declaration of contraband, to the power to which such port belongs. A vessel is also deemed to be aware of a state of war if she left an enemy port after the opening of hostilities.

Art. 44. A vessel stopped because carrying contraband, and not liable to condemnation on account of the proportion of contraband, may, according to circumstances, be allowed to continue her voyage if the master is ready to deliver the contraband to the belligerent ship.

The delivery of the contraband is to be entered by the captor on the log-book of the vessel stopped and the master of the vessel must furnish the captor duly certified copies of all relevant papers.

The captor is at liberty to destroy the contraband which is thus delivered to him.

CHAPTER III.—UNNEUTRAL SERVICE.

Art. 45. A neutral vessel is liable to be condemned and, in a general way, is liable to the same treatment which a neutral vessel would undergo when liable to condemnation on account of contraband of war:

(1) If she is making a voyage specially with a view to the transport of individual passengers who are embodied in the armed force of the enemy, or with a view to the transmission of information in the interest of the enemy.

(2) If, with the knowledge of the owner, of the one who chartered the vessel entire, or of the master, she is transporting a military detachment of the enemy, or one or more persons who, during the voyage, lend direct assistance to the operations of the enemy.

In the cases specified in the preceding paragraphs (1) and (2), goods belonging to the owner of the vessel are likewise liable to condemnation.

The provisions of the present Article do not apply if when the vessel is encountered at sea she is unaware of the opening of hostilities, or if the master, after becoming aware of the opening of hostilities, has not been able to disembark the passengers. The vessel is deemed to know of the state of war if she left an enemy port after the opening of hostilities, or a neutral port after there had been made in sufficient time a notification of the opening of hostilities to the Power to which such port belongs.

Art. 46. A neutral vessel is liable to be condemned and, in a general way, is liable to the same treatment which she would undergo if she were a merchant vessel of the enemy:

(1) If she takes a direct part in the hostilities.

(2) If she is under the orders or under the control of an agent placed on board by the enemy Government.

(3) If she is chartered entire by the enemy Government.

(4) If she is at the time and exclusively either devoted to the transport of enemy troops or to the transmission of information in the interest of the enemy.

In the cases specified in the present Article, the goods belonging to the owner of the vessel are likewise liable to condemnation.

Art. 47. Any individual embodied in the armed force of the enemy, and who is found on board a neutral merchant vessel, may be made a prisoner of war, even though there be no ground for the capture of the vessel.

CHAPTER IV.—DESTRUCTION OF NEUTRAL PRIZES.

Art. 48. A captured neutral vessel is not to be destroyed by the captor, but must be taken into such port as is proper in order to determine there the rights as regards the validity of the capture.

Art. 49. As an exception, a neutral vessel captured by a belligerent ship, and which would be liable to condemnation, may be destroyed if the observance of Article 48 would involve danger to the ship of war or to the success of the operations in which she is at the time engaged.

Art. 50. Before the destruction the persons on board must be placed in safety, and all the ship's papers and other documents which those interested consider relevant for the decision as to the validity of the capture must be taken on board the ship of war.

Art. 51. A captor who has destroyed a neutral vessel must, as a condition precedent to any decision upon the validity of the capture, establish in fact that he only acted in the face of an exceptional necessity such as is contemplated in Article 49. Failing to do this, he must compensate the parties interested without examination as to whether or not the capture was valid.

Art. 52. If the capture of a neutral vessel, of which the destruction has been justified, is subsequently held to be invalid, the captor must compensate those interested, in place of the restitution to which they would have been entitled.

Art. 53. If neutral goods which were not liable to condemnation have been destroyed with the vessel, the owner of such goods is entitled to compensation.

Art. 54. The captor has the right to require the giving up of, or to proceed to destroy, goods liable to condemnation found on board a vessel which herself is not liable to condemnation, provided that the circumstances are such as, according to Article 49, justify the destruction of a vessel liable to condemnation. The captor enters the goods delivered or destroyed in the log-book of the vessel stopped, and must procure from the master duly certified copies of all relevant papers. When the giving up or destruction has been completed and the formalities have been fulfilled, the master must be allowed to continue his voyage.

The provisions of Articles 51 and 52 respecting the obligations of a captor who has destroyed a neutral vessel are applicable.

CHAPTER V.—TRANSFER OF FLAG.

Art. 55. The transfer of an enemy vessel to a neutral flag, effected before the opening of hostilities, is valid, unless it is proved that such transfer was made in order to evade the consequences which the enemy character of the vessel would involve. There is, however, a presumption that the transfer is void if the bill of sale is not on board in case the vessel has lost her belligerent nationality less than sixty days before the opening of hostilities. Proof to the contrary is admitted.

There is absolute presumption of the validity of a transfer effected more than thirty days before the opening of hostilities if it is absolute, complete, conforms to the laws of the countries concern-

ed, and if its effect is such that the control of the vessel and the profits of her employment do not remain in the same hands as before the transfer.

If, however, the vessel lost her belligerent nationality less than sixty days before the opening of hostilities, and if the bill of sale is not on board, the capture of the vessel would not give a right to compensation.

Art. 56. The transfer of an enemy vessel to a neutral flag, effected after the opening of hostilities, is void unless it is proved that such transfer was not made in order to evade the consequences which the enemy character of the vessel would involve.

There is, however, absolute presumption that a transfer is void:

(1) If the transfer has been made during a voyage or in a blockaded port.

(2) If there is a right of redemption or of reversion.

(3) If the requirements upon which the right to fly the flag depends according to the laws of the country of the flag hoisted have not been observed.

CHAPTER VI.—ENEMY CHARACTER.

Art. 57. Subject to the provisions respecting the transfer of flag, the neutral or enemy character of a vessel is determined by the flag which she has the right to fly.

The case in which a neutral vessel is engaged in a trade which is reserved in time of peace, remains outside the scope of, and is in no wise affected by this rule.

Art. 58. The neutral or enemy character of goods found on board an enemy vessel is determined by the neutral or enemy character of the owner.

Art. 59. If the neutral character of goods found on board an enemy vessel is not proven, they are presumed to be enemy goods.

Art. 60. The enemy character of goods on board an enemy vessel continues until they reach their destination, notwithstanding an intervening transfer after the opening of hostilities while the goods are being forwarded.

If, however, prior to the capture a former neutral owner exercises, on the bankruptcy of a present enemy owner, a legal right to recover the goods, they regain their neutral character.

CHAPTER VII.—CONVOY.

Art. 61. Neutral vessels under convoy of their national flag are exempt from search. The commander of a convoy gives, in writing, at the request of the commander of a belligerent ship of war, all information as to the character of the vessels and their cargoes, which could be obtained by visit and search.

Art. 62. If the commander of the belligerent ship of war has reason to suspect that the confidence of the commander of the convoy has been abused, he communicates his suspicions to him. In such a case it is for the commander of the convoy alone to conduct an investigation. He must state the result of such investigation in a report, of which a copy is furnished to the officer of the ship of war. If, in the opinion of the commander of the convoy, the facts thus stated justify the capture of one or more vessels, the protection of the convoy must be withdrawn from such vessels.

CHAPTER VIII.—RESISTANCE TO SEARCH.

Art. 63. Forceful resistance to the legitimate exercise of the right of stoppage, visit and search, and capture, involves in all cases the condemnation of the vessel. The cargo is liable to the same treatment which the cargo of an enemy vessel would undergo. Goods belonging to the master or owner of the vessel are regarded as enemy goods.

CHAPTER IX.—COMPENSATION.

Art. 64. If the capture of a vessel or of goods is not upheld by the prize court, or if without being brought to judgment the captured vessel is released, those interested have the right to compensation, unless there were sufficient reasons for capturing the vessel or goods.

FINAL PROVISIONS.

Art. 65. The provisions of the present Declaration form an indivisible whole.

Art. 66. The Signatory Powers undertake to secure the reciprocal observance of the rules contained in this Declaration in case of a war in which the belligerents are all parties to this Declaration. They will therefore issue the necessary instructions to their authorities and to their armed forces, and will take the measures which are proper in order to guarantee the application of the Declaration by their Courts and more particularly by their prize courts.

Art. 67. The present Declaration shall be ratified as soon as possible.

The ratifications shall be deposited in London.

The first deposit of ratifications shall be recorded in a Protocol signed by the Representatives of the Powers taking part therein, and by His Britannic Majesty's Principal Secretary of State for Foreign Affairs.

The subsequent deposits of ratifications shall be made by means of a written notification addressed to the British Government, and accompanied by the instrument of ratification.

A duly certified copy of the Protocol relating to the first deposit of ratifications, and of the notifications mentioned in the preceding paragraph as well as of the instruments of ratification which ac-

company them, shall be immediately sent by the British Government, through the diplomatic channel, to the Signatory Powers. The said Government shall, in the cases contemplated in the preceding paragraph, inform them at the same time of the date on which it received the notification.

Art. 68. The present Declaration shall take effect, in the case of the Powers which were parties to the first deposit of ratifications, sixty days after the date of the Protocol recording such deposit, and, in the case of the Powers which shall ratify subsequently, sixty days after the notification of their ratification shall have been received by the British Government.

Art. 69. If it happens that one of the Signatory Powers wishes to denounce the present Declaration, such denunciation can only be made to take effect at the end of a period of twelve years, beginning sixty days after the first deposit of ratifications, and, after that time, at the end of successive periods of six years, of which the first will begin at the end of the period of twelve years.

Such denunciation must be notified in writing, at least one year in advance, to the British Government, which shall inform all the other Powers.

It will only operate in respect of the Power which shall have made the notification.

Art. 70. The Powers represented at the London Naval Conference attach particular value to the general recognition of the rules which they have adopted and express the hope that the Powers which were not represented will adhere to the present Declaration. They request the British Government to invite them to do so.

A Power which desires to adhere notifies its intention in writing to the British Government, in transmitting the act of adhesion, which will be deposited in the archives of the said Government.

The said Government shall forthwith transmit to all the other Powers a duly certified copy of the notification, as also of the act of adhesion, stating the date on which it received the notification. The adhesion takes effect sixty days after such date.

The position of the adhering Powers shall be in all matters concerning this Declaration similar to the position of the Signatory Powers.

Art. 71. The present Declaration, which shall bear the date of the 26th February, 1909, may be signed in London until the 30th June, 1909, by the Plenipotentiaries of the Powers represented at the Naval Conference.

In faith whereof the Plenipotentiaries have signed the present Declaration, and have thereto affixed their seals.

Done at London, the twenty-sixth day of February, one thousand nine hundred and nine, in a single original, which shall remain deposited in the archives of the British Government, and of which duly certified copies shall be sent through the diplomatic channel to the Powers represented at the Naval Conference.

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